No. 3197

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

STEAMER AVALON COMPANY (a corporation),

Appellant,

vs.

HUBBARD STEAMSHIP COMPANY (a corporation), claimant of the American steamer "General Hubbard", her engines, boilers, machinery, tackle, apparel, furniture and cargo,

Appellee.

BRIEF FOR APPELLEE.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
CHARLES W. WILLARD,
Proctors for Appellee.

HERALD-WALSH PRINTING CO.

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Statement of the Case.

The steam schooner "General Hubbard" departed from the Columbia River on the evening of July 24, 1916, loaded with a cargo of lumber, bound for the port of San Pedro. About midnight of that day, and while approximately 14 miles from Cape Meares, in the usual course of coastwise vessels, her crank shaft broke, rendering her engines useless. Her master,

after consulting with the chief engineer, shot the usual rockets to attract the attention of the lighthouse keeper at Cape Meares, so that the latter might communicate with the mills of the owner of the vessel. A little later a vessel northbound without cargo was observed inshore. The master of the "General Hubbard" thereupon displayed his searchlight and again shot rockets to attract the attention of the passing vessel, which proved to be the "Avalon", owned by appellant.

The "Avalon" then came up to the "General Hubbard", and, on request of her master, and after an explanation of the condition of the vessel, agreed to tow her into the Columbia River. After passing the hawser to the "General Hubbard" by means of the usual heaving lines, and at about 2:25 a. m., both vessels proceeded to the desired destination where the "General Hubbard" anchored at about 8:20 p. m.

The night of the service was starlight, with a light breeze and a moderate northwest swell running. During the day the wind died down until it was absolutely calm. No seas of any kind were encountered during the entire time that the service was being performed, and none were to be reasonably anticipated because it was the fairest season of the year for that vicinity.

Thereafter, and on August 1, 1916, appellant libeled the "General Hubbard" in the court below to recover compensation for the salvage services alleged to have been performed by the "Avalon" and appellee was forced to file an admiralty stipulation for the release of the vessel in the sum of $20,000. Subsequently, and

on October 17, 1916, the master and crew of the "Avalon", acting by and through proctor for appellant, filed a second libel against appellee claiming compensation for salvage services performed by them as distinct from their vessel.

Prior to the time that the second libel was filed, the master and crew of the vessel had, for a valuable consideration, assigned all of their rights and claims for compensation to appellant.

Both libels were later consolidated for trial, and in handing down its opinion the learned court below directed that the libel of the master and crew be dismissed, holding and deciding that they, having assigned their rights to appellant, were not entitled to maintain their libel. The sum of $2000 and costs were awarded appellant on its libel, and it has prosecuted this appeal from that judgment. An appeal has not been taken by the master and crew of the "Avalon" and the decree of the District Court is, as to them, final.

THE CIRCUMSTANCES SURROUNDING THE COMMENCEMENT OF THE SERVICE.

The "General Hubbard", laden with 1,646,910 feet of lumber, valued at the mill at Astoria at $15,801.21 (Ap. 153), broke her crank shaft when approximately 14 miles northeast one quarter east from Cape Meares Lighthouse (Article IV of libel). After talking matters over with the chief engineer, Captain Watts, master of the "General Hubbard", decided to throw

up rockets to attract the lighthouse keeper at Cape Meares so that a steam tug could be sent out to him. He thought that they would know what steamer it was there at that time, and would telephone to the Hammond Lumber Company at Tongue Point (Astoria) and that they would send out a tug boat from Astoria (Ap. 80).

After sending off several rockets so as to attract the attention of the lighthouse keeper, he saw a steamer slightly inshore, which paid no attention to them, but after sending off more rockets and playing the searchlight, the steamer, which proved to be the "Avalon", turned around and came alongside the "General Hubbard" (Ap. 81) whereupon Captain Christensen says Captain Watts asked him to tow the "General Hubbard" to Astoria (Ap. 25).

The "Avalon" moved off a short distance and got her hawser ready and then started "to pick him up, to get him in tow". Captain Christensen went up alongside of the "General Hubbard" first and steamed up ahead a little bit and stopped her engines and gradually let his ship drop astern until the stem of the "Avalon" was within 30 or 40 feet of the bow of the "General Hubbard" (Ap. 27). A heaving line was then cast and the hawser hauled aboard of the "General Hubbard" and made fast. At 2:30 a. m. the "Avalon" straightened out on the line and proceeded to the Columbia River. There is no testimony that the hawser was passed and made fast under difficulties. The conditions of sea were such that the two vessels could be and were brought close together

for the passing of the hawser by means of a heaving line without the slightest risk of collision. Not a witness even suggested such peril and the libel itself makes no mention of it. Neither Captain Christensen nor Chief Engineer Rodland intimated any risk of the line fouling the wheel, and Captain Watts who was the only witness questioned regarding it, strenuously denied the possibility, except through possible carelessness on the "Avalon" (Ap. 101-2). No such danger is averred in the libel. The suggestion should be dismissed as without merit.

The Weather

What was the weather at that time? Captain Christensen says that it was a dark night, but that the stars were shining (Ap. 28); that *"there was a moderate swell running, northwest swell,"* and a light breeze (Ap. 26-7), and not, as the libel avers, "a heavy westerly swell". Captain Watts said the sea was very moderate, very quiet (Ap. 84), and First Officer Johnson, of the "General Hubbard", characterized it as a moderate sea and light swell (Ap. 42-44, 61-2). These opinions are substantially in accord, are uncontradicted and certainly establish the fact that the swell was moderate, the sea quiet and the wind light.

The weather report at North Head Station at the mouth of the Columbia River (respondent's exhibit A)* clearly demonstrates the favorable weather experienced during the whole time the services were being performed. The velocity of the wind during the whole

*On file herein as an original exhibit.

day of the 25th was not at any time greater than 20 miles. Manifestly, with such light wind the swell and sea would be, as the witnesses testified, moderate.

The Danger to the "General Hubbard".

And what of the alleged danger to the "General Hubbard"? We take Captain Christensen's own words:

> "Q. What danger was there to the 'Hubbard' before you got your hawser on her?
>
> A. *There was no danger except as I say, if a northwesterly gale of wind came up and she would drop her deckload and fill up with water; of course she was 14 miles from shore; and we must admit the fact that there was plenty of water to drift; she was 14 miles off shore.*
>
> Q. What effect if any would the swell have had upon her if it had increased in violence?
>
> * * * * * * *
>
> A. If she lost her deckload she might have filled up with water; *that is the only thing that would* have happened to her." (Ap. 34.)

Surely it cannot be urged in view of this testimony that the "General Hubbard" was in any danger of going ashore.

The only other danger suggested was that the "General Hubbard" *might* roll and lose her deckload. To do that she would have to break her stanchions (Ap. 36-7). But there was no evidence that she was in any danger of doing anything of the kind. There was not enough swell to make her roll (Ap. 44). Certainly the conditions then prevailing *were not such as to lead to any apprehension, for wind and* sea were most

moderate. Nor was any heavy swell to be anticipated in view of the season of the year.

The danger is to be judged by the conditions which actually prevail and those which may reasonably be anticipated. It is not to be judged by the possibility of extraordinary conditions neither actually occurring nor reasonably to be anticipated.

This does not mean that the service is necessarily to be determined in the light of subsequent events, but it does mean that it must be estimated by the facts which seem to surround it at the time. There must be something more than mere possibility in the supposed or suggested dangers. As said by Mr. Justice Story, in one of his learned admiralty decisions:

> "Salvage is a compensation for the rescue of the property from present, pressing, impending perils; *and not* for the rescue of it from *possible* future perils." (Italics ours.)
>
> *The Emulous,* F. C. 4480.

See, also,

> *The Young America,* 20 Fed. 926;
> *The Lowther Castle,* 195 Fed. 604.

The accident occurred on the 25th day of July, in the middle of summer, *when the fairest kind of weather prevails on the Oregon coast.* There was no ground, then, for any apprehension of any danger from violent weather, for even the possibility of such contention was destroyed by the testimony of First Officer Johnson, who had 16 years' experience on this coast and who was submitted to a serious cross-examination on

the subject. Storms are not to be reasonably expected at that season of the year (Ap. 50-51, 53). There was no other evidence offered. Appellant did not take the trouble even to question Captain Christensen about it.

It is pertinent to note that there is no entry in the log book of either vessel tending to show the existence of any danger. Furthermore, the volume of traffic up and down the coast is common knowledge, and the "General Hubbard" was in the usual course of coastwise vessels. In fact the record shows that other vessels were in the vicinity at the time. Mr. Johnson saw two other steamers southbound (Ap. 59), and Mr. Rodland saw another vessel inshore from them while they were putting the hawser aboard the "General Hubbard" (Ap. 37). Captain Christensen also saw a vessel inshore of him (Ap. 34). She was also within sight of Cape Meares Lighthouse and not far distant from the entrance to the Columbia River, where two seagoing tugs are maintained (Ap. 105), one of which the "Oneonta", subsequently towed her in her disabled condition from the Columbia River to San Pedro. Thus towage and other assistance was readily available, *"which is a circumstance proper to be considered in determining the question of compensation to be allowed libelants"*.

The Jessomene, 47 Fed. 903,

or as stated by Judge Morrow in

The Monticello, 81 Fed. 211-14,

> "The effect of this proof is, of course, to reduce the merit of the services rendered by the San Benito. It is always considered by courts of

admiralty an important element in fixing the compensation to be awarded."

See, also,

35 Cyc., 755.

The Towage to the Columbia River.

The towage to the Columbia River was without incident. Captain Watts testified that the weather moderated; in fact died down to a calm (Ap. 83). First Officer Johnson said that they had fine weather all the way; clear sky and light wind, northwest, a little swell, nothing to speak of, and not enough to stop them, or to make any disturbance, or roll the ship (Ap. 45-47).

Captain Christensen makes no reference in his testimony to any incident or condition of danger on the voyage. No entry pertaining to it appears in the "Avalon's" log book, save "Lt. (light) westerly wind, clear weather, northwesterly swell" (Ap. 33). Even the libel contains no averment as to danger of collision, or capsizing, or getting the line in the wheel or yawing strains, and from a glance at its exaggerated averments it is safe to venture the statement that the charges would have been made if there had been the semblance of their existence.

Captain Christensen testified on direct examination that the biggest difficulty was at red buoy No. 4 right opposite the south jetty; that they laid there for about half an hour; could not make an inch of headway as there was no flood tide; that there was a heavy freshet in the river (Ap. 28). As to the danger he said that it

would have taken very little to have put the "General Hubbard" on the south jetty and to have taken the "Avalon" with her (Ap. 29).

All that Chief Engineer Rodland had to say on the subject was that there was a strong freshet running, and that it took them quite a time getting over the bar because the current was too strong (Ap. 36). He says not a word about being stopped for half an hour or about any danger of being set toward the south jetty. If it had been the fact that the "Avalon" was stopped or in danger of being carried on to the south jetty, is it not reasonable to suppose that the chief engineer would have been asked by appellant about it? He was questioned about the situation of the "General Hubbard" when she was taken in tow. Or would not the log book have contained some reference to it?

Opposed to this at least very dubious testimony of the master and engineer of the "Avalon" is the testimony of the lighthouse keeper, and the master and chief officer of the "General Hubbard".

Appellant, in face of the foregoing facts, apparently realizes the improbability of this court accepting the testimony of Captain Christensen on this question. It does not in this court urge the danger to which Captain Christensen testifies. It urges instead that the danger was of the vessel's piling up on Peacock Spit, a danger as to which there is no testimony whatever and which was not urged in the lower court.

The court will note that neither the master nor the chief engineer of the "Avalon" made any suggestion

that by reason of the strong currents (or any other reason) "the said vessels were laboring heavily,"* as the libel avers. The allegation is simply without any support in the evidence.

Captain Watts said that at the time the vessel crossed the bar into the river the bar was perfectly smooth (Ap. 86, 100). Chief Officer Johnson described it as smooth, "no swell on at all" (Ap. 47) and neither Christensen nor Chief Engineer Rodland made any reference to any swell or sea on the bar in speaking of the difficulties claimed to have been encountered. Captain Wickland called it a "moderate sea" (Ap. 121). It is perfectly apparent that the bar was moderate and presented no unfavorable or dangerous conditions.

In addition to the fact that the vessels passed over the bar without difficulty or incident (the only conclusion that can be fairly drawn from the evidence) there is also the fact that immediately outside the bar there was good anchorage where if there had been the slightest danger to the vessels grounding in the then current, they could have anchored safely and waited for a flood tide (Ap. 47-105).

We respectfully submit that the facts demonstrate conclusively that the services to the "General Hubbard" were, as the court below found them to be,

*Captain Wickland, in answer to a question of appellant's proctor on this subject said:

> "A. I have to try to explain that to you, Mr. Spittle. When we came alongside of the vessel she was not very far from No. 4 buoy, that is considered one of the worst places in going out there under ordinary conditions, and she was not laboring heavier than when we went alongside and took a letter from the captain of the 'General Hubbard'. you may imagine how she labored. We went alongside with a power boat and they lowered the letter."

unattended with any danger whatsoever to either vessel, and that they were, in fact, but towage of the most ordinary kind, rendered to a disabled vessel, and hence on that account entitled to be classed as salvage services, but of a low order which does not rise to the dignity of salvage in the true sense.

The findings of the lower court, being supported by the evidence, will not, under the settled rule of this court, be disturbed.

Alaska Packers' Ass'n v. Domenico et al, 117 Fed. 99;

Peterson et al. v. Larsen, 177 Fed. 44;

The Bailey Gatzert, 179 Fed. 617;

The Hardy, 229 Fed. 985;

San Francisco & Portland Steamship Company v. Leggett Steamship Company, (decided by this court October 7, 1918).

THE VALUES INVOLVED.

The appellant realizes the weakness of its case upon the important elements usually considered by admiralty courts in making salvage awards.

The most important elements—danger and peril—have for obvious reasons, received little attention in its brief. The brief dwells at length on the asserted values involved as if that element were the all-controlling one in arriving at the correct amount. Indeed it passes over the real facts of the case and contends that the character and value of the property at

risk is the question of prime importance. This contention is not supported by the authorities.

The values involved should, of course, receive consideration, but in such a case as the present one, we submit that the question of value is of secondary importance. As said by the Circuit Court of Appeals for the Fifth Circuit, in

> *Compagnie Commerciale De Transport a Vapeur Francaise, et al. v. Charente Steamship Co., Limited et al.,* 60 Fed. 921-4,
>
> "The exact value of the property saved, where large, is but a minor element in computing salvage, * * *."

The courts have frequently enunciated the same principle as will appear from the decisions, a few of which we cite.

In

> *The Philah,* F. C. 11091a,

the court said:

> "However great the value, the salvage is to be simply an adequate remuneration."

The language of the court in

> *The George Gilchrist,* F. C. 5333,

is quite applicable to the facts of this case. It said:

> "This is one of those cases in which a disabled vessel is opportunely and successfully taken in tow, but in such a place, that she might count with pretty strong hope on other assistance in default of that of the actual salvor. In such a case the need of succor is not so urgent as to make the amount saved the most important element of the salvage service,"

In

The Baker, 25 Fed. 771-4,

the Circuit Court said:

> "Neither the value of the property imperilled nor the exact quantum of service performed is a controlling consideration in determining the compensation to be made."

The syllabi in the two following decisions correctly set forth the views of the court:

In

Bowley v. Goddard, F. C. 1736,

the syllabus reads:

> "The value saved is not a very important element in awarding a salvage when the danger *is not immediate,* and the situation of the saved vessel is such that *other assistance* might probably have been rendered if that of the actual salvors had not been accepted."

In

The Carroll, 167 Fed. 112,

the following appears in the syllabus:

> "Where a salvage service rendered by a tug was in the nature of a towage, and the danger was not certain and extreme, an allowance of a lump sum as compensation, bearing some relation to the cost of the service if rendered under a contract, is fairer than a percentage of the value of the salved property."

The same doctrine is announced in

Hughes on Admiralty, page 139,

as follows:

> "In an ordinary case of towage salvage, for instance, its award for saving $500,000 would not greatly differ from its award for saving $300,000."

The authors of *Cyc.* say:

> "The exact value of property saved, where large, is but a minor element in computing salvage."
>
> *35 Cyc.*, 754.

It is apparent, therefore, that the principle is sound and of universal application. In every case where the values involved are large and the services are attended without exposure to any particular danger, a very small percentage might amount to an excessive allowance. It is this controlling principle that has led the courts to say that a salvage service which hardly exceeds an ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction.

The law of the admiralty does not contain any scale by which the amount earned by salvors may be determined. This much, however, is clear. Where the salvage is not attended by any risk or peril and consists merely in picking up the disabled vessel in a calm sea and good weather, and towing her into port without danger or incident, the service performed differs little in character from that of towage and goes but little beyond it. The award undoubtedly, even in such a case (which is that presented here) should go beyond that of merely reasonable compensation for a towage service, this because of the policy of encouraging and rewarding salvors. But the award should not go far beyond this and should bear relation to what would be reason-

able compensation only for services rendered, for the reason that the elements for which reward is given, those of risk and peril, are not present. The award in this case in view of all the circumstances was adequate.

Counsel makes much of what he assumes or supposes the owners of the vessel would have been willing to pay for the supposed rescue. There are two replies to this:

First. It would make the assumed necessities of the owners the measure of the award to which the salvor is entitled. This is not the law and it is wholly contrary to the policy of the law. Time and again contracts for salvage exacted from the master of a disabled vessel, because of the dire necessity of his vessel, have been abrogated and set aside.

Second. There was no such necessity in this case as appellant's counsel assumes. No one had any fear of the safety of the "General Hubbard". Her master expected to communicate with the lighthouse keeper who would have caused a tug to be dispatched. Two tugs are maintained at the mouth of the river by the Port of Portland (Ap. 105), either of which was capable of towing the "General Hubbard". One of them, as has been pointed out, later towed the vessel to San Pedro. The owner of the vessel also had its mill at Tongue Point on the Columbia River, where tugs could have been obtained, and the master of the vessel, if ready assistance was not available, and he could not attract the attention of the lighthouse keeper, expected to send his boat to Cape Meares to arrange for a tug (Ap. 103-4). No one can tell what the owners of the

"General Hubbard" would have agreed to pay if they had been aware of the situation and it had come to making a bargain for her being brought back to port. Certain it is, however, that they would not have agreed to much more than the cost of sending a tug out to get her and tow her in.

The Value of the "General Hubbard."

As for the value of the "General Hubbard", we submit that the judgment of Captain Pillsbury should be taken as a fair one. He was called upon by the owners and underwriters to make an appraisement—not for insurance purposes, as appellant states (brief p. 9), but for general average purposes (Ap. 182-9), so that the general average adjusters would be able to apportion the cost of the salvage service between the shipowner and its underwriters. The court knows, as a matter of law, that general average liabilities are independent of any principle of marine insurance and are apportioned on the basis of actual values of the properties involved. The matter of marine insurance comes in only as shipowner or cargo owner may be wholly or partially insured against it. Manifestly, Captain Pillsbury was not placing any fictitious valuation on the "General Hubbard" for insurance purposes, and from his statements as to the factors which entered into his calculations, it is manifest that he endeavored to place a fair valuation upon the ship at a time when the value of vessels was fluctuating as never before in maritime history.

The fact that the "General Hubbard" sold two or three months later for $463,125 is no evidence of what

her actual value was at Astoria on July 25, 1916. The times were too speculative to justify the acceptance of that price as a basis of value in July.

It may be that Captain Pillsbury was conservative. In a time of fevered speculations in shipping and hugely mounting values, a conservative judgment is the only safe and reliable judgment. On the other hand it is to be noted that when he placed an off-hand valuaton on the "Avalon" it was $25,000 higher than the value appellant pleaded by an amendment made in open court during the morning session. This incident is some indication of how speculative were men's minds on the subject of ship values.

In the absence of better proof, we respectfully submit that the value fixed by Captain Pillsbury is the correct one.

The court will note that in the original libel, appellant alleged that the value of the "General Hubbard" was $300,000 and the "Avalon" $125,000. On the day of trial, it amended the former to $465,000 and the latter to $200,000. In explanation of the change of allegation as to the "Avalon's" value, Mr. Wood explained that he told Mr. Olson that he did not want to put in any inflated values on any of their ships, and that they would put it in at just exactly what she cost them. But he did not assign any such reason for alleging the value of the "General Hubbard" to be $300,000. In fact, he could not, for the cost complete five years before was $209,329.66 (Ap. 197). It is a fair inference that when Mr. Wood verified the libel, he considered the

value of the "General Hubbard' to be just what the libel stated, $300,000.

The Cargo.

If the value of the cargo should enter into consideration at all, on the theory of salvage, it can do so only on the basis of its value at Astoria, namely, $15,801.21, for salvage is based on values at the place where the salvage services are terminated, not at the port to which the cargo may be subsequently taken. It was not of the value of $25,000 as stated on page 7 of appellant's brief.

The Freight.

Freight on the cargo ultimately delivered at San Pedro amounted to $9,881.46. But on the authority of the decision of this court in

Perriam v. Pacific Coast Co., 133 Fed. 140,

it cannot be taken into consideration even on the basis of salvage, for the "General Hubbard" had but commenced her voyage, and was returned to the port of her departure. No freight was saved.

The Value of the "Avalon."

The value originally fixed in the libel for the "Avalon" was $125,000. In support of the amendment, made on the trial, increasing the alleged valuation to $200,000, Mr. Wood said that they put it in at cost because they didn't want to put in any inflated values on their ships. Can we be criticized, therefore, for inferring from that statement that the witness must have considered that

they were putting in an inflated value when they jumped it to $200,000?

They fixed upon the valuation of the "Avalon" by comparison with an offer of $225,000 for the "Solano". But the "Avalon" was two years older, carried 100,000 feet less cargo, was smaller by 125 tons, and only had a horse-power of 575 according to the master (Ap. 34) and 625 according to the engineer (Ap. 36). As a matter of fact the official registers give her horse-power at 550. It is selfevident that the "Avalon" was not the ship that the "Solano" was.

We submit that the best evidence of the value of the "Avalon" was the prices for which the "Rosalie Mahony" and "Mary Olson" were sold about the middle of 1916, namely, $160,000 (Ap. 159). They were about the same size as the "Avalon" (Ap. 157) and sold in a special market to meet the demands of a particular trade (Ap. 161). While Mr. Parr, who told of the sales, stated that those vessels were not in as good condition as the "Avalon" on account of having carried mahogany logs on the Atlantic, it developed that this was hearsay, and the fact is that both the "Rosalie Mahony" and "Mary Olson" are one year younger than the "Avalon".

The authorities cited by appellant's proctor have no application to the case at bar. The award in a salvage case depends most largely on the risk and peril involved. These elements are not present here. They were present in every case cited by appellant's proctor.

Thus, in the case of

The Gallego, 30 Fed. 271,

the steamer had drifted helplessly for two days over 100 miles off the Florida coast, and would, as the court expressly found, have drifted ashore on a dangerous reef. She had been refused assistance by passing vessels, and was in a position of great peril. The service performed by the salving vessel occupied five days, during which a heavy gale was encountered. She was actually delayed eight days, during the whole of which time she was subjected to all of the usual marine risks. During the time the service was performed, the vessels were actually in collision, with resulting damage to the salving vessel, and nine inch hawsers, in the heavy weather encountered, parted three times. Upon the facts of that case, the court very properly said that it was one in which a liberal award should be made.

In

The Italia, 42 Fed. 416,

a large vessel with *220 passengers* on board, broke down 750 miles out from New York, to which port she was towed, while laboring in a heavy sea. Stormy weather was encountered—in fact a succession of gales swept over the course of the vessels. The salving vessel, too, had on board 461 passengers, and the service occupied four days. The court expressly found that the service was an important one, and that the disabled vessel was released from a perilous position.

In

The Charles Wetmore, 51 Fed. 449,

the service was performed in the middle of winter when

strong and rough seas were to be expected, and were actually encountered. The salving vessel, at the time she saw the disabled vessel, was in a place of refuge into which she had put on account of the boisterous weather that was prevailing. This safe place she voluntarily gave up and proceeded to the assistance of the disabled vessel. The court also found that "The 'Wetmore' was rescued from a position of great danger when the 'Zambesi' took hold of her near Tillamook Rock".

In

The Chatfield, 52 Fed. 479,

the rescued vessel broke down in the Atlantic off Cape Henry in the winter season at a time when very strong winds were blowing which increased to a gale. In fact the court said that the place where the service was rendered is "proverbially dangerous in the pendency of heavy winds".

The court also said:

> "On the coast between Cape Henry and Charleston the difficulty and danger of salvage services are exceptionally great, requiring more liberal awards for those which prove successful than services rendered in other safer waters, on other and safer coasts."

In this case, after the hawsers parted three times in the heavy seas, the "Brigham" steamed around the disabled vessel all night and was actually in collision with her, causing considerable damage. Realizing that she could not be of further assistance to the disabled vessel in the weather prevailing, she steamed after other

assistance, but, before the assistance arrived, the "City of Augusta", a large passenger vessel, took the "Chatfield" in tow, and towed her into Hampton Roads. The City of Augusta encountered gales and was also in collision with the disabled vessel. Furthermore, it appears that at the time she came up to the "Chatfield" the latter was dragging her anchors and drifting upon the beach, and would have brought up there within eight hours.

A glance at the facts of the case of

The Sun, reported in 161 Fed. 385,

will at once point out the distinguishing elements between that case and the present one. There the disabled vessel had drifted from February 18th to March 2nd, on the Atlantic coast in the middle of winter. The salving vessel was in attendance four days on account of the service and actually lost six days' time.

The facts in the case of

The Sahara, 246 Fed. 141,

were that in a dense fog, the "Sahara" stranded on a reef off the coast of Virginia. This coast is exceedingly dangerous and her rescue was effected by a powerful tug there kept ready for just such emergencies. The court very properly said that public interests require the maintenance of such vessels, and, in order that they may be maintained, it is necessary that they be liberally compensated when they perform a successful and dangerous salvage service.

THE DISCRETION OF THE TRIAL COURT.

We submit that under no possible view can it be held that the award in this case is so inadequate as to amount to or be an *abuse of discretion* on the part of the trial court. To us the award seems adequate. We have no doubt that to appellant's proctor it genuinely seems inadequate. To the appellate court, it might or it might not seem adequate if the court were to look at the matter as one of first impression. The point is that it makes no difference. The case is not to be looked at as one of first impression. It is an appeal from a decision of the trial court on a matter peculiarly left to its discretion. It is not enough that the appellate court should feel that possibly, or probably or even certainly, it would have made a larger award if it had been sitting in the place of the trial court, and its discretion substituted for that of the trial court. Its discretion is not to be substituted. It must appear not merely that there is a difference of judgment, but that the judgment of the trial court is without reason, is an abuse of the discretion entrusted to it.

This rule in regard to salvage awards is thoroughly well established.

Thus in

The Florence, 71 Fed. 527,

the Circuit Court of Appeals for the Second Circuit said:

> "We should have been better satisfied with a somewhat larger award in this case than was allowed by the court below, but cannot find that it was so manifestly inadequate as to justify its revision by an appellate court. It did not proceed

upon wrong principle or any misapprehension of the facts, and different minds could reasonably reach a different conclusion upon the matter. We cannot interfere with it without violating the salutary rule not to change the decree of the court below in salvage causes unless there is an exceedingly strong case made out of abuse or palpable mistake in the exercise of its discretion."

This court in

Simpson v. Dollar, 109 Fed. 814,

enunciated the same rule as follows:

"In the light of many of the precedents, the amount awarded seems low. We cannot say, however, that it is manifestly inadequate, or that the district court has adopted any erroneous principle in arriving at his conclusion. No exact criterion can be found for estimating the amount of salvage in any case. The judgments of courts must necessarily differ as to the precise amount to be allowed under given circumstances. Where there has been no mistake in fact, or application of an unwarranted rule of compensation in arriving at the award, and the amount allowed cannot be clearly seen to be inappropriate, the courts on appeal have been reluctant to disturb the decision of the trial court. The Bay of Naples, 1 C. C. A. 81; 48 Fed. 737; The Amity, 16 C. C. A. 170; 69 Fed. 110; The George W. Clyde, 30 C. C. A. 292; 86 Fed. 665; The Trefusis, 39 C. C. A. 96; 98 Fed. 314; The Emulous, 1 Summ. 214, Fed. Cas. No. 4480."

For other similar statements of the rule, see:

The Emulous, F. C. 4480;

Hume v. J. D. Spreckels & Bros. Co., 115 Fed. 51 (9th Circuit);

Perriam v. Pacific Coast Co., 133 Fed. 140 (9th Circuit);

The Roanoke, 214 Fed. 63 (9th Circuit);
The Sybil, 4 Wheat. 98; 4 L. Ed. 522;
The Connemara, 118 U. S. 352; 27 L. ed. 751;
The Hesper, 123 U. S. 256; 30 L. ed. 1175;
The Carrier Dove, 2 Moore P. C. (N. S.) 254;
The Clarisse, 12 Moore P. C. 340; 14 Eng. Reprints 940.

We submit that under no circumstances can it be justly said the award of the trial court amounted to an abuse of discretion. If this be true, it is an end of the matter.

THE SALVAGE CLAIM OF THE MASTER AND CREW OF THE VESSEL.

Two libels were presented below, one by the owner of the "Avalon" and one by the master and crew. These were tried together and the claim of the master and crew was dismissed and an award rendered in favor of the owner of the vessel only. No appeal was taken from the dismissal of the libel by the master and crew for reasons which a statement of the matter will make apparent and this claim is not directly before the court. The facts in connection with it, however, appear in the record and are of such a character that they may well be taken into consideration in a determination of the appeal on the owner's claim. It is well established that the conduct of the salvor may be considered in determining the amount to be allowed. For instance in

The Ragnarok, 158 Fed. 694,

the court said:

> "It is undoubtedly true, that where a libelant shows such unconscionable greed and such inaccurate or false claims as to throw doubt upon the entire matter, such conduct may resolve a doubtful case in favor of the claimant, render it impossible to place credence in the story of the libelant, or even be a basis for holding that no compensation should be allowed for whatever services were rendered."

Marvin, in his work on *Wreck and Salvage,* at page 226, says:

> "A court of admiralty is to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in other courts of equity; that the party who asks aid, must come with clean hands."

And on page 233:

> "Good faith and fairness are required of salvors in the manner of settling the salvage."

See, also:

The Aurora, F. C. 659;
The Byron, F. C. 2275;
The Mount Washington, F. C. 9887;
The Young America, 20 Fed. 926;
The Cherokee, 31 Fed. 167;
The Bremen, 111 Fed. 228;
The Banes, 147 Fed. 192.

The "General Hubbard" was towed into the Columbia River on July 25, 1916. Six days later, on August 1st, the libel by the owner was filed. Eleven days after the salvage, on August 5th, the owner took from the master and crew an absolute and full ~~satisfaction~~ of

all their claims for salvage, paying therefor to the master and each of the crew a half month's wages, aggregating a total of $885 (Ap. 195).

At the same time the owner took from the master and crew another and very different document (Ap. 172) wherein and whereby ostensibly the master and crew placed their claim in the hands of the owner for collection by suit or settlement and the owner agreed on its part to use its best efforts to collect as large an award as possible *and distribute it equitably among the officers and crew.*

In view of the fact that the officers and crew had absolutely parted with their claim to the owner, this second document could have been executed only for the purpose of concealment and to obtain for the pecuniary benefit of the owner whatever sympathy or consideration might possibly exist, perhaps not unnaturally, in the mind of the court for a claim by the officers and crew as distinguished from a claim by the owner.

Nor is this all. On October 17, 1916, a libel was filed in the name of the officers and crew. In answering this libel the appellee propounded certain interrogatories designed to discover whether or not the ostensible libelants had parted with their claim. In response to these interrogatories, the second document of August 5, 1916 —what we may justly term the camouflage document— was exhibited, but not the real assignment, nor was any reference to it made. It was not until the actual trial of the case and then only after persistent efforts by appellee's proctor that its existence was admitted and it was produced (Ap. 165-178, 195). Up to this time

the libel in the name of the officers and crew of the "Avalon" was ostensibly being prosecuted for their benefit.

The foregoing facts speak for themselves. They need no comment by us. In connection with them and as throwing light on the character of the libel here involved, we would ask the court to read the allegations of the libel itself (Ap. 5) and contrast them with the actual facts as disclosed by the testimony. In our experience we have known in no salvage case of such exaggerated and unsupported claims.

We do not know whether or not this conduct and the making of these exaggerated and unsupported claims influenced the trial court in fixing its award. We believe, however, that this court may now properly consider them in determining whether the lower court abused its discretion. This might not be true in any but a salvage case. But in a salvage case, the award is in considerable part in the nature of a reward over and above compensation merely, and in determining the award the meritorious or unmeritorious conduct and claims of the salvor are elements to be considered.

Dated, San Francisco,
October 25, 1918.

Respectfully submitted,

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
CHARLES W. WILLARD,
Proctors for Appellee.

No. 3198

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon

N. D. ELLIOTT, PRINTER, SALEM, ORE.

ERRATA

Page 32, line 13, last word "and" should be "any."

Page 34, line 10, "so amend" should be "to amend."

Page 40, line 10, "section 1" should be "section 1a."

Page 65, line 1, paragraph 1, words "equitable and ratable" should be "equitably and ratably."

Page 68, 6th line from the bottom the word "contact" should be "contract."

Page 72, 5th line from bottom the word "application" should be "applicable."

Page 76, under exhibit C, headings of columns have been omitted. They should be as follows: year, month, number of hydrants, amount.

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Plaintiffs in Error

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham,
Yeon Building, Portland, Oregon, for the Defendant in Error.

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Bldg., Portland, Oregon,
for the Plaintiffs in Error.

INDEX

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon,—ss.

To Salem Water, Light and Power Company, a corporation, Wood, Montague & Hunt, Your Attorneys of Record,
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22nd day of May in the year of our Lord, one thousand, nine hundred and eighteen.

CHAS. E. WOLVERTON,
Judge.

Service accepted
May 22nd, 1918.

M. M. MATTHIESSEN,
of Attorneys for Plaintiff.

Filed May 22nd, 1918. G. H. Marsh, Clerk.

WRIT OF ERROR

In the United States Circuit Court of Appeals for the Ninth Circuit

The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer,

Plaintiffs in Error,

vs. Writ of Error.

Salem Water, Light & Power Company, a corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judge of the District Court of the United States for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgement of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Salem Water, Light & Power Company, a corporation, Plaintiff and Defendant in Error, and The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor and C. O. Rice, its Treasurer, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of the said Plaintiffs in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforsaid, and, in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforsaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforsaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE,
Chief Justice of the Supreme Court of the United States this 22nd day of May, 1918.

(Seal)

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

The foregoing Writ of Error was served on the District Court of the United States for the District of Oregon by depositing with me as the Clerk of said

Treasurer of the City of Salem, Oregon, the municipal corporation above named.

III.

That the Public Service Commission of the State of Oregon is a commission duly organized, created and existing by act of the Legislature of the State of Oregon which is known as Chapter 279 of the Session Laws of 1911, and entitled, "An Act to define public utilities, "and to provide for their regulation in this state, and "for that purpose to confer upon the Railroad Com- "mission of Oregon power and jurisdiction to super- "vise and regulate such public utilities, and providing "the manner in which the power and jurisdiction of "such commission shall be exercised, prescribing pen- "alties for the violation of the provisions of this Act, "and the procedure and rules of evidence in relation "thereto, making an appropriation to carry out the "provisions hereof, amending Section 2 of Chapter 53 "of the Laws of Oregon for the year 1907, the same "being Section 6876 of Lord's Oregon Laws, and de- "claring an emergency", together with all acts amendatory thereof and supplemental thereto.

IV.

That heretofore The Salem Water Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon was organized for the purpose, among other things, of supplying water to the inhabitants and residents of the City of Salem, Oregon, and for such other public purposes as could be

rightfully and lawfully given to it. That heretofore and on or about April 16, 1891, the City of Salem, then being a municipal corporation and empowred so to do, did enact an ordinance known as Ordinance No. 207, wherein and whereby The Salem Water Company, an Oregon corporation, was given the right, privilege and franchise to lay down pipes in the streets and alleys of said city, and to excavate streets and alleys for that purpose, and to supply the citizens and inhabitants of the City of Salem, Oregon, with water. That said Ordinance No. 207 was entitled, "An Ordinance providing for the laying down of pipes for water in the "streets and alleys of the City of Salem, by The Salem "Water Company". That said rights and privileges aforsaid were given to the said Salem Water Company, its successors and assigns, by said Ordinance No. 207. That said Ordinance No. 207 was amended by the Council of the City of Salem on the 18th day of April, 1898, by an Ordinance known as Ordinance No. 346, the same being an ordinance to amend Section 1 of an ordinance entitled "An Ordinance providing for the "laying down of pipes for water in the streets and al- "leys of the City of Salem, by the Salem Water Com- "pany". That the said Salem Water Company was given further franchises, rights and privileges by the City of Salem by ordinance of the City Council duly enacted, which ordinance was known as No. 368 and was entitled, 'An Ordinance authorizing and permit- "ting The Salem Water Company to construct and "maintain a flume across Liberty Street of the City of "Salem, between blocks numbered eighteen and thirty-

"six in said City", and that The Salem Water Company and its successors, the Salem Water, Light & Power Company, now hold said rights, privileges and franchises by virtue of said Ordinance No. 207 aforesaid, No. 346 aforesaid, and No. 368 aforesaid, and all ordinances and acts amendatory thereof and supplemental thereto. That heretofore The Salem Water Company, an Oregon corporation, for a valuable consideration, transferred, set over and assigned unto this plaintiff, the Salem Water, Light & Power Company, a corporation of Arizona, all the of its right, title and interest in and to said franchisees, rights and privileges so granted to said Salem Water Company by said Ordinances No. 207, No. 346 and No. 368, and the acts supplemental thereto and amendatory thereof, and did further transfer, assign and set over unto the Salem Water, Light & Power Company all of its property, real, personal and mixed, including all franchises, rights and privileges, and the said Salem Water, Light & Power Company, plaintiff above named, is now the owner thereof.

V.

That in and by section 4 of Ordinance No. 207, as enacted by the City Council of the City of Salem aforesaid, it was provided:

> "The said Salem Water Company, their "successors or assigns, shall not charge, at any "time, higher rates for water than is custo- "marily allowed for water in towns or cities "of like population on the Pacific Coast but

"The Salem Water Company, its successors "or assigns, shall not at any time charge more "than one dollar and eighty-two cents ($1.82) "per month for each hydrant or cistern act- "ually supplied. And the right is hereby re- "served by the City of Salem to continue or "discontinue, to connect or disconnect any or "all hydrants or cisterns connected, or which "may hereafter be connected, with said works; "and the City of Salem shall not pay for said "hydrants or cisterns, while the same are dis- "connected or discontinued."

VI.

That heretofore and on or about the 20th day of May, 1913, the City of Salem, a municipal corporation, of the State of Oregon, did file a complaint with the Public Service Commission of the State of Oregon, then known as the Railroad Commission of the State of Oregon, entitled as follows: "Before the Railroad "Commission of the State of Oregon. The City of "Salem, a municipal corporation, plaintiff, vs. Salem "Water, Light & Power Co., a corporation, defendant, "No. U. F. ———, Complaint", wherein and whereby the said City of Salem did set forth that the plaintiff was at the times therein mentioned a municipal corporation organized and existing under and by virtue of the laws of the State of Oregon and located in the County of Marion, in said state, and that the said defendant therein named, to-wit, the Salem Water, Light & Power Company, a corporation, was a corporation organized and existing under and by virtue of the laws of the State of Arizona, and is a public utility engaged in the business of supplying water to the inhabitants

of the plaintiff municipal corporation, and as a part of said business owns, operates and controls a water works pumping plant, water mains, reservoirs, pumps and other equipment and apparatus used in connection therewith. That said Salem Water, Light & Power Company, as a public utility, is subject to the provisions of Chapter 279 of the laws of Oregon for the year 1911. The said complaint before the Railroad Commission of the State of Oregon further set forth that the distributing system of the Salem Water, Light & Power Company was inadequate to supply the demands of the residents and citizens of the City of Salem, and that said water supply was inadequate, both for domestic use and fire protection, and that the rates so charged by said Salem Water, Light & Power Company were unequal, wherein said complaint the said City of Salem did conclude with a prayer as follows:

> "WHEREFORE, plaintiff prays your "Commission to make such necessary orders "for the extension of the distributing mains of "the defendant as will relieve the plaintiff of "the condition set forth in this complaint so "that the plaintiff may have adequate water "service both for domestic as well as fire pro- "tection. That the rates of the defendant "may be adjusted and equalized so that the "same shall be uniform and equal and that "said rates may be reduced so that the charges "may return to the defendant a reasonable re- "turn upon its investment. Plaintiff also "prays for an examination and appraisal of

"the water works system and plant of the de-
"fendant and for such other and further relief
"as may be meet and proper under the provi-
"sions of the Oregon Public Utilities Act, being
"Chapter 279 of the laws of the State of Ore-
"gon for the year 1911."

VII.

That after said complaint had been filed with the Railroad Commission of the State of Oregon, the Council of the said City of Salem did, on the 16th day of March, 1914, adopt a resolution known as Resolution No. 1294, the same being in words and figures as follows, to wit:

"BE IT RESOLVED by the Common
"council that the Railroad Commission in ad-
"justing the rates of the Salem Water Co. for
"the City of Salem on the private users, that
"they take into consideration the price at
"which the hydrants should be charged to
"make an equitable rate for the private user,
"and if the rate now charged the City for hy-
"drants by The Salem Water Co. is too high
"or too low, that it be adjusted accordingly.
"That the City Recorder be instructed to send
"a copy of this resolution to the Railroad
"Commission.

"Adopted by the Common Council this
"16th day of March, 1914.

"ATTEST: Chas, F. Elgin,
"City Recorder."

That a copy of said resolutions as prepared was given to the said Public Service Commission of the State of Oregon, and the said Public Service Commission of the State of Oregon in making the findings hereinafter referred to did act pursuant to said request so voiced in Resolution No. 1294, as adopted by the said Council of the City of Salem on the 16th day of May, 1914.

VIII.

That after said complaint of the City of Salem had been filed with the Public Service Commission and after the said resolution hereinbefore referred to as Resolution No. 1294 adopted by the City Council of the City of Salem on the 16th day of March, 1914, the said Public Service Commission did have a full hearing on all matters mentioned and referred to in said complaint and in said resolution and did thereafter and on or about the 19th day of August, 1914, make and render a decree wherein, among other things, it was found that the rate of $1.82 charged by the Salem Water, Light & Power Company to the City of Salem for its fire hydrants cast an undue burden upon the other users of water and did find and decree, among other things, that the City of Salem should pay unto the Salem Water, Light & Power Company two dollars and fifty cents ($2.50) per hydrant per month for all hydrants to which water was furnished by the said Salem Water, Light & Power Company. That pursuant to the order and decree of said Railroad Commission it was provided that said rate so established by it, and particularly the rate to be paid by the City

of Salem for hydrant rental, should be in force and become effective from and after the first day of October, 1914. That thereafter the said Salem Water, Light & Power Company continued to furnish unto the City of Salem and to the fire hydrants thereof water for the uses and purposes for which said fire hydrants were established, and the said City of Salem did accept said service without dissent.

IX.

That all bills due and payable to the Salem Water Light & Power Company from the City of Salem, as aforesaid, are payable in advance on or before the 10th day of each month. That heretofore and ever since the first day of October, 1914, the Salem Water, Light & Power Company has furnished to the City of Salem water for hydrant purposes, and the said City of Salem has accepted the same, but said City of Salem has refused and now refuses to pay for such service, although demand has been made therefor. That the months of such service, together with the number of hydrants served, together with the amount due therefor respectively, is as follows, to wit:

Year	Month	Number of Hydrants	Amount
1914	October	148	$370.00
"	November	155	387.50
"	December	157	392.50
1915	January	157	330.88
"	February	157	392.50
"	March	157	392.50
"	April	157	392.50

1915	May	157	392.50
"	June	159	397.50
"	July	163	407.50
"	August	166	415.00
"	September	166	415.00
"	October	167	417.50
"	November	167	417.50
"	December	167	417.50
1916	January	167	417.50
"	February	167	417.50
"	March	168	420.00
"	April	168	420.00
"	May	168	420.00
"	June	168	420.00
"	July	168	420.00
"	August	168	420.00
"	September	176	440.00
"	October	176	440.00
"	November	176	440.00
"	December	176	440.00
1917	January	176	440.00
"	February	176	440.00
"	March	176	440.00
"	April	176	440.00

That all bills due and payable to the Salem Water, Light & Power Company from the City of Salem as aforesaid are payable in advance on or before the tenth day of each month. That in addition to the foregoing amounts now due to the Salem Water, Light & Power Company from the City of Salem there is further due to the Salem Water, Light & Power Company from

the City of Salem interest on each of the foregoing amounts for rental services, said interest being at the rate of six per cent per annum from the respective due dates thereof.

X

That demand has been made upon the City of Salem for payment of the foregoing amounts, with interest thereon at the rate of six per cent. per annum from the respective due dates thereof, and the said City of Salem has refused to pay the same and now refuses to pay the same.

WHEREFORE, plaintiff prays that it have judgment against the City of Salem for the following amounts, to wit:

The sum of three hundred and seventy dollars ($370.), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1914; the further sum of three hundred eighty-seven and fifty-hundredths dollars ($387.50), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1914; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1914; the further sum of three hundred thirty and 88-100 dollars ($330.88), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.-50), with interest thereon at the rate of six per cent. per annum from the 10th day of February, 1915; the

further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of May, 1915; the further sum of three hundred ninety-seven and 50-100 dollars ($397.50), with interest thereon at the rate of six per cent. per annum from the 10th day of June, 1915; the further sum of four hundred and seven and 50-100 dollars ($407.50), with interest the thereon at the rate of six per cent. per annum from the 10th day of July, 1915; the further sum of four hundred fifteen dollars ($415.), with interest thereon at the rate of six per cent. per annum from the 10th day of August, 1915; the further sum of four hundred fifteen dollars ($415.), with interest thereon at the rate of six per cent. per annum from the 10th day of September, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1915; the further sum of four hundred

seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1916; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of February, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1916; the further sum of four hundred twenty dollars ($420.). with interest thereon at the rate of six per cent. per annum from the 10th day of May, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of June, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of July, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of August, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of September, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1916; the furth-

er sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six percent. per annum from the 10th day of February, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1917; and its costs and disbursements herein.

WOOD, MONTAGUE, HUNT & COOKINGHAM
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON.—ss.

I, C. A. PARK, being first duly sworn, on oath say that I am president of the SALEM WATER, LIGHT & POWER COMPANY, the above named plaintiff; that I am duly and legally authorized to make this verification; that I have read the foregoing complaint and the same is true as I verily believe.

C. A. PARK

Subscribed and sworn to before me this 12th day of May, 1917.

C. B. WOODWORTH
Notary Public for Oregon.
My commission expires
Nov. 30, 1920

(NOTARIAL SEAL)

And afterwards, to-wit, on the 28th day of August, 1917, the following proceedings were had in said cause.

ORDER PERMITTING AMENDMENT OF COMPLAINT BY INTERLINEATION

In accordance with the stipulation of the parties hereto, signed by their respective counsel and filed herein, it is hereby ordered, upon motion of the plaintiff, that the plaintiff be, and it hereby is given permission to amend its complaint herein by interlineation so as to allege that Ordinance No. 207, mentioned in Paragraph IV of said complaint was approved on April 16, 1891; that Ordinance No. 346, mentioned in said Paragraph IV was approved on April 16, 1898; and that Ordinance No. 368, also mentioned in said Paragraph IV, was approved on October 25, 1899; and further that the answer heretofore filed in this cause by the defendants shall stand for and be deemed to be the answer of the defendants to the complaint herein as amended, pursuant to this order, and the stipulation upon which it is based.

Done in open court this 28th day of August, 1917.

(Sgd) CHAS. E. WOLVERTON

District Judge

Filed August 28,1917. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of February, 1918, there was duly filed in said Court, an amended answer in words and figures as follows, to-wit:

AMENDED ANSWER

Comes now the above named defendants by order of Court had and obtained, and files this, their amended

answer to plaintiff's complaint on file herein, and admit, deny, and allege, as follows:

I.

Admits each and every allegation contained in paragraph I of plaintiff's said complaint and the whole thereof.

II.

Answering paragraph II of plaintiff's said complaint, the defendants admit each and every allegation, matter and thing alleged in said paragraph and the whole thereof, and said defendants further allege that the said Acts of the Legislative Assembly referred to in said Paragraph II of plaintiff's complaint were duly and regularly passed by the Legislative Assembly of the State of Oregon, pursuant to Section 2 of Article XI of the Constitition of the State of Oregon, adopted by the people of the State of Oregon in the year 1859, and which provided as follows:

> "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

and were and now are a part of the existing charter of said City of Salem, Oregon, and in and by an Act of the Legislative Assembly of the State of Oregon entitled:—

"An Act to amend Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 18 of an Act entitled an Act to Incorporate the City of Salem and all Acts amendatory thereof, otherwise known as the Charter of the City of Salem, approved October, 1862, and Sections 27 and 36 of the Act supplemental thereto, approved February 16, 1887."

and which Act was filed in the office of the Secretary of State on the 25th day of February, 1889, and Acts amendatory thereto referred to in paragraph II of plaintiff's complaint, it was provided that Section III of said Act, incorporating the City of Salem should be amended so as to read as follows:—

"The City shall have power and is authorized to purchase, receive and hold property, both real and personal, within its corporate limits, for public buildings, public works and other city improvements, and may lease, sell or otherwise dispose of the same; to purchase, receive and hold property, both real and personal, beyond its limits, for the establishment and maintanance of a hospital for the reception, care and treatment of persons infected with contagious and dangerous diseases; for the erection and operation of water and gas or other illuminating works for the supply of the City and the inhabitants thereof with water and light, and to control and manage said hospital and works, or to lease, sell or

dispose of the same for the benefit of the city; to make contracts, to sue and be sued; to have and use a corporate seal and the same to change at pleasure."

and in and by an Act of the Legislative Assembly of the State of Oregon, entitled:—

"An Act to amend Section 6 of an Act entitled "An Act to Incorporate the City of Salem," approved October, 1862, as amended by an Act entitled "An Act to amend an Act entitled 'An Act to Incorporate the City of Salem,' approved October, 1862," approved October 28, 1874, as amended by an Act entitled "An Act entitled an Act to amend Sections 6, 8, 9, 16 and 23 of the Charter of the City of Salem, and to Provide for the Improvement and Extension of Streets, and for the Construction and Repair of Sidewalks, Sewers and drains in said City, and to provide for the performance of the Duties of Recorder in Case of His Disability," approved February 16, 1887, as amended by an Act entitled "An Act to amend Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 18 of an Act entitled 'An Act to Incorporate the City of Salem,' and all Acts amendatory thereof, otherwise Known as the Charter of said City of Salem, approved October, 1862, and Sections 27 and 36 of an Act Supplemental Thereto," approved February

16, 1887, filed in the Office of the Secretary of State February 25, 1889."

and which Act was filed in the office of the Secretary of State on the 21st day of February, 1891, and which took effect on said day by virtue of an emergency clause contained in Section II of said Act, and which provided that said Act incorporating the City of Salem should be amended by amending Section VI thereof so as to read as follows:—

> "The Mayor and Aldermen shall comprise the common council of said City, and at any meeting shall have exclusive power—* * * *
> *Subdivision* 6. To provide for lighting the streets and furnishing the City and the Inhabitants thereof with gas or other light, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.
> *Subdivision* 12. To establish and regulate a fire department; to provide for the prevention and extinguishment of fires and for the protection of property endangered thereby; to appoint fire wardens and prescribe their duties,

and to compel any person or persons present to aid in the extinguishing of such fires and the protection of property exposed thereto.

Subdivision 27. To make by-laws and ordinances not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of this charter, and to provide for the punishment of persons violating city ordinances by fine or imprisonment, or both, and the working of such persons on the streets of the City or at any other work; but no fine shall exceed the sum of One Hundred dollars, nor shall any imprisonment exceed twenty days."

and the foregoing sections quoted and the subdivisions hereof were and now are a part of the Acts of the Legislative Assembly referred to in said Paragraph II of plaintiff's complaint, and are now in force and effect, and are a part of the existing charter of said City of Salem, being Section III and subdivisions 6, 12, and 27 of Section VI of said Acts referred to in Paragraph II of plaintiff's said complaint.

III

Answering paragraph III of plaintiff's complaint, defendants admit each and every allegation, matter, and thing alleged in said paragraph and the whole thereof, and further allege that said Chapter No. 279 of the Session Laws of 1911 was enacted subsequent to the Acts of the Legislative Assembly referred to in paragraph II of plaintiff's complaint, and subsequent to the amendment to Section II of Article 11 of the

Constitution of the State of Oregon as the same was amended by the vote of the people at the general election held November 8, 1910, and subsequent to the adoption of Section Ia of Article IV of the Constitution of the State of Oregon as hereinafter alleged, and subsequent to the amendment to Section VI by said act of the Legislative Assembly filed on the 21st of February, 1891, and referred to in paragraph II of this Amended Answer and which provided, as follows:—

> "The mayor and aldermen shall comprise the common council of the City, and at any meeting shall have exclusive power—
>
> *Subdivision* 26. To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the City; to permit and regulate the use of the streets, alleys, and public grounds of the City for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights; to preserve the streets, alleys, side and cross-walks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying

passengers on street railways, and water rates."

and subsequent to an act of the Legislative Assembly passed on the.....day of February, 1903, whereby Section VI of the Charter of said City of Salem, hereinbefore referred to was amended by adding a new subdivision to section VI, which was as follows:—

"The mayor and aldermen shall comprise the Common Council of said City, and at any meeting thereof shall have exclusive power:

Subdivision 41. To license, regulate, and tax telephone companies, telephone offices, and to fix the maximum rate to be charged by telephone companies for the rental and use of telephones; to license, regulate and tax water, gas, and electric light and power companies, and to fix the maximum rates to be charged by any person, company, or corporation for water, electric or gas light, or power, supplied by such person or company, to private or public consumers within the city; to license, regulate, and tax express and telegraph companies; and to license, regulate and tax bicycles, tricycles, tandoms, and automobiles, and to regulate control, or prohibit the use of any therof on the streets of the City."

IV

Answering paragraph IV of plaintiff's said complaint, the defendants admit each and every allegation therein contained and the whole thereof, and further

allege that said ordinances No. 207, No 346, and No. 368 referred to in said paragraph IV of plaintiff's complaint were duly and regularly enacted and passed by the Common Council of said defendant, City of Salem, Oregon, prior to the said Chapter 279 of the Session Laws for 1911 becoming effective, and under and by virtue of the provisions of Section III and subdivisions 6, 12, and 27 of Section VI of the Charter of said defendant City set forth in paragraph II of defendant's answer.

V

Answering paragraph V of plaintiff's said complaint the defendants admit each and every allegation set forth in said paragraph, and further allege that said Section IV of Ordinance No. 207 of the City of Salem was and is, among others one of the terms and conditions prescribed by the Common Council of said city for allowing the plaintiff's assignor, the Salem Water Company, a corporation, the use of the streets and alleys of the said city of Salem for the establishment of a water works for supplying the said City of Salem and its inhabitants thereof, with water for fire protection and other purposes, and which was to be paid for as the same was furnished and supplied by plaintiff's and plaintiff's Assignor by the defendant, City of Salem by moneys raised by taxation, and the same was and is a general obligation of said defendant city, and was, and is, one of the considerations for granting said Salem Water Company the privileges and franchises for laying down pipes in the streets and

alleys of defendant City, and was, and is a preferential rate for furnishing water to defendant City as aforesaid; and defendants further allege that in and by said Ordinance No. 207, Ordinance No. 346 and Ordinance No. 368 that in consideration of the said Common Council granting unto said Salem Water Company and its successors and assigns, the right to use the streets and alleys of said City for the purposes of supplying water to the residents of such city, it was provided in section II of said Ordinance No. 207, as follows:—

> "That the Salem Water Company, its successors and assigns, shall furnish the City of Salem, free of charge, with water for two fountains in Wilson Avenue and one in Marion Square, from the first day of May to the 31st day of October of each year, and water for the use of all engine houses, rooms for firemen's meetings, the council chambers, the city prison and all offices in the City buildings used by any of its officers or agents, and shall also furnish water for a public drinking fountain for man and beast at such place as may be designated by the Common Council;"

and was provided by Section VII thereof as follows:—

> "The Salem Water Company, their successors or assigns, shall file their acceptance of this grant in writing with the City Recorder within ten days after the passage of this ordinance."

Passed April 15, 1891. Approved April 16, 1891, and thereupon and prior to ten days after the passage of said ordinance No. 207, the said Salem Water Company accepted the terms and provisions of said ordinance, and particularly Section IV thereof, set forth in paragraph V of plaintiff's said complaint, became a contract between defendant, City of Salem, Oregon, and said Salem Water Company, its successors and assigns, the plaintiff herein.

VI

"Answering paragraph VI of plaintiff's said complaint, the defendants admit each and every allegation therein contained and further allege that for long prior to the filling of said complaint with the Public Service Commission of the State of Oregon, the defendant City was informed and believed that the rates, tariffs, and charges made by said Salem Water Company, and its successors and assigns, the plaintiff herein for supplying water to the inhabitants of said City, the said rates, tariffs, and charges were unreasonable, unjust, discriminatory, disproportionate, and unequal as between different patrons and consumers thereof; and thereupon for the purpose of securing an appraisement of the valuation of the property and equipment of the said plaintiff and having determined by the said Public Service Commission as to whether or not the said plaintiff herein was charging its patrons unreasonable, unjust rates, tariffs, and charges for the private use of water and as to determine whether or not the said rates were discriminatory, disproportionate, and unequal as between private users of water furnished

by said plaintiff, and to have findings made thereon by said Public Service Commission, as said Public Service Commission is empowered to do, the defendant, City of Salem, caused to be filed with the said Public Service Commission the complaint and petition referred to in paragraph VI of plaintiff's complaint, a copy of which is hereunto attached marked "Exhibit A" hereof and by this reference made a part of this answer, and said complaint was not filed by said defendant, City of Salem, for the purpose of changing any fire water rate, tariff, or charge fixed by the City of Salem by Section II of said Ordinance No. 207 and Ordinances amendatory thereof, or by changing and reduced or preferential rate fixed in said Section IV of said Ordinance 207 of the City of Salem as between defendant City and the plaintiff herein.

VII

Answering paragraph VII of plaintiff's complaint said defendants admit each and every allegation therein contained, and further allege that subsequent to the filing of said petition referred to in paragraph VI hereof, and which is "Exhibit A" of this amended answer with the Public Service Commission of the State of Oregon, and while the said petition was under consideration by said Commission, the members of said Comission requested the City Attorney of defendant City to secure the adoption of a resolution by the Common Council of defendant City embodying the terms set forth in said Resolution No. 1294, but in and by Section VI of said Ordinance No. 207, and in and by Section III of said Ordinance No. 346, and in and by

Section III of Ordinance No. 368, it was provided as follows:—

> "This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except, for the violation by them of any of the provisions of this Ordinance."

and thereafter, in accordance with the terms and provisions of said Ordinances, and a short time prior to the introduction of said Resolution No. 1294 into the Common Council of defendant City through its City Attorney, requested the plaintiff herein to join in said resolution and consent and agree with said defendant City, that said Public Service Commission should make a finding and determination as to the amount of a just and reasonable charge for said defendant City to pay the plaintiff for supplying the hydrants of said defendant City with water, for the purposes hereinbefore alleged, and thereafter, the defendant City, through its Common Council would amend Section IV of said Ordinance 207 in accordance with the order, finding and decree of the said Public Service Commission as to the amount of a just and reasonable rate and charge to be paid by defendant City to plaintiff for furnishing and supplying the hydrants and cisterns of said defendant City with water, but said plaintiff refused to join with defendant City in said Resolution No. 1294 or agree or consent thereto prior or after the adoption thereof by the Common Council of said defendant City, and prior to a determination thereof by the Public Service Commission, and thereafter, defen-

dant City for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate, and tariff to be paid by defendant City to the plaintiff for furnishing defendant City with water for its hydrants and cisterns, and only as advisory in such matters and not otherwise, defendant City adopted the aforesaid Resolution and caused to be filed with the said Public Service Commission said Resolution No. 1294, so as to enable said defendant City thereafter, if it so desired to do with the consent of said plaintiff, so amend said Ordinance No. 207, and Ordinance No. 346 and No. 368, amendatory thereof, in accordance with the finding and determination of the Public Service Commission as to the amount of said rate and charge and tariff found to be just and reasonable, and defendant city did never agree or contract with said plaintiff that said City would be bound or agree to the rate, charge, and tariff found to be reasonable by said Public Service Commission, in reference to any reduced or preferential rate fixed by defendant City, as a part of the consideration for granting plaintiff's Assignors the rights, privileges, and franchises hereinbefore alleged.

VIII

Answering paragraph VIII of plaintiff's said complaint the defendants admit each and every allegation contained in paragraph VIII, except, defendants deny that the City of Salem did accept the use of water for its fire hydrants without dissent, and defendants further allege that the said City of Salem immediately upon the making of said order and decree by the Public Ser-

vice Commission, as alleged in said Paragraph VIII of plaintiff's complaint, a copy of which is hereunto attached marked "Exhibit B" hereof and by this reference made a part of this answer, the said City of Salem refused to accept or abide by the terms and directions of said order and decree of said Public Service Commission, insofar, as said order or decree attempted or purported to increse the rate and charge fixed by Section IV of said Ordinance No. 207, in the sum of One and 82-100 ($1.82) dollars per month for water service for each hydrant and cistern, and immediately so notified the said plaintiff, and plaintiff further alleges: that the said Public Service Commission of the State of Oregon had no power or jurisdiction to change any rate or charge fixed in the franchise and contract between the plaintiff and the defendant City by virtue of any provision contained in said Chapter No. 279 of the Session Laws for 1911, for it was provided by an Act of the Legislative Assembly of the State of Oregon, known as Chapter No. 80 and filed in the Office of the Secretary of State, February 15, 1911, wherein it was provided in section II of said act as follows:—

> "All contracts or agreements heretofore made, and now in effect for the sale and disposal of water or electricity by incorporated cities or towns, and by any person, persons, or corporporation, operating, controlling or owning water or electric light and power systems, to any person persons or corporation within or without the limits of such incorporated city or town, in which such system is operated, are

hereby ratified and declared legal and valid contracts, insofar as the right of such city or town to contract with reference to same is concerned."

and defendant further alleges: that in and by Section No. 63 of said Chapter No. 279 of the Session Laws of 1911, it is provided as follows:

"Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States, the State, or any municipality thereof, or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility from giving free transportation or service, or reduced rates therefor, to its officers, agents, surgeons, physicians, employees and attorneys at law, or members of their families, or to former employees to such public utilities or members of their families where such former employees have become disabled in the service of such public utility or are unable from physical disqualification to continue in the service, or to members of families of deceased employees of such public utility; to ministers of religion inmates of hospitals and charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work.

The Commission may in its discretion require to be filed with it by any public utility a list, verified under oath of the President, manager, superintendent or secretary of any public utility, of all free or reduced rate privileges granted by such public utility under the provisions of this section."

IX

Answering paragraph IX of plaintiff's said complaint, defendants deny each and every allegation contained in said paragraph and the whole thereof, and further allege that the plaintiff, commencing with the month of October, 1914, and each and every month thereafter, demanded payment from the defendant City for water service for the hydrants and cisterns of said City of Salem in the sum of two and 50-100 ($2.50) dollars per month, at the times and in the amounts set forth in paragraph said paragraph, and that the said defendant, City of Salem, refused to pay the same, or any part thereof, except, the defendant through its duly authorized officers of said City, offered to pay the said plaintiff the sum of one and 82-100 ($1.82) dollars per month for each hydrant and cistern used by said defendant, and actually tendered plaintiff the money therefor at the times and in the amounts specified in defendants' "Exhibit C" hereof, hereunto attached and by this reference made a part of this answer, but the plaintiff refused to accept the same, or any part thereof.

X

Answering paragraph X of plaintiff's complaint, defendants deny the same and the whole thereof, except as hereinbefore expressly admitted or alleged.

For a first and seperate amended answer and defense said defendants allege as follows:

I

That insofar as said Chapter 279 of the Session Laws of Oregon for 1911 empowers the Public Service Commission to change or fix the rates, charges, and tariffs in the amounts fixed by said City of Salem in said Ordinance No. 207, agreed upon between the plaintiff herein and said defendant, as is provided in Section IV of said Ordinance No. 207, for supplying the hydrants and cisterns of said City with water by the plaintiff herein, and delegated to said City by Section III and Subdivisions 6, 12 and 27 of Section VI of said Acts of the Legislative Assembly referred to in paragraph II of plaintiff's complaint and set forth in said Resoulution No. 1294, and the said order and decree of said Public Service Commission increasing the rates, tariffs and charges to be paid by defendant city to plaintiff for supplying its hydrants and cisterns with water, from one and 82-100 ($1.82) dollars per month per hydrant to the sum of two and 50-100 ($2.-50) dollars per month per hydrant, is an impairment of the obligations of defendant's and plaintiff's said contract whereby in consideration of the defendant City granting the plaintiff the rights, franchises, and

privileges of laying down pipes in the streets and alleys of said City of Salem for the purpose of supplying the inhabitants thereof with water, the plaintiff agreed to supply the hydrants and cisterns of defendant city with water for the sum of one and 82-100 ($1.82) dollars per month, and is in violation of Section X of Article I of the Constitution of the United States, and is a taking of defendant's property without due process of law and a denial of the equal protection of the laws inhibited by Section I of the Fourteenth Amendment of the Constitution of the United States, and is likewise a violation of Section XXI of Article I of the Constitution of the State of Oregon providing that no law impairing the obligation of a contract shall ever be passed.

For a second further and seperate Amended Answer and defense to plaintiff's complaint on file herein, defendants allege as follows:

I

That subsequent to the Acts of the Legislative Assembly of the State of Oregon incorporating the City of Salem, Oregon, as alleged in Paragraph II of plaintiff's complaint and paragraph II of defendant's answer, and on or about the 4th day of June, 1906, Section II of Article XI of the Constitution of the State of Oregon was amended to read as follows:—

> "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The Legislative

> Assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon."

and on or about the said 4th day of June, 1906, Section I of Article IV of said constitution was amended by adding thereto Section I which is as follows:—

> "The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved by the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities, and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exersising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal

> voters may be required to order the referendum, nor more than fifteen per cent to propose any measure, by the initative, in any city or town.

and in so far as the Public Service Commisssion of the State of Oregon is invested with power to change any rate, tariff and charge for furnishing the hydrants and cisterns of said city with water enacted by defendant City pursuant to the terms and provisions of Section III and Subdivision 6, 12, 27 of Section VI of said Acts of the Legislative Assembly incorporating the City of Salem, and set forth in paragraph II of defendant's amended answer herein, and referred to in paragraph II of plaintiff' complaint, and insofar as the order of the said Public Service Commisssion referred to in paragraph VIII of plaintiff's complaint attempts to change and increase the rates, charges, and tariffs fixed in Section IV of said Ordinance No. 207 and Ordinances amendatory thereof referred to in paragraph V of plaintiff's complaint and duly enacted by the common council of defendant City as alleged in paragraph IV of defendant's amended answer is an attempt by an Act of the Legislative Assembly of the State of Oregon, to amend Section IV of said Ordinance No. 207, and to amend Section III and subdivisions 6, 12, 26, 27 and 41 of Section VI of said Acts of the Legislative Assembly incorporating the City of Salem, as alleged in paragraph II, and paragraph III, of defendant's amended answer herein.

For a third and seperate answer and defense to

plaintiff's complaint on file herein, defendant allege:

I

That in and by Section XVIII of said act to incorporate the City of Salem, referred to in paragraph II of plaintiff's complaint on file herein, it is provided as follows:—

> "No ordinance passed by the Council shall go into force or be of any effect until approved by the mayor, except as provided in Sections XVIX, XX and XXI, and in and by the rules of the Common Council of the City of Salem, Oregon, duly adopted on the 15th day of March, 1909, it was provided in rule seven thereof as follows:
>
> 'Each committee to which any matter is referred shall submit at the next regular meeting after such reference, unless further time be granted by the council, a written or verbal report on same, with or without recommendation. Such report shall be presented, in order and in open session, by the chairman, or other member of the committee, and if written it shall be filed by the Recorder and entered upon the journal. When a committee fails to report on a subject, the matter may be brought before the council by unanimous consent, or by motion. All resolutions shall be in writing and numbered consecutively in the order in which they are introduced, 'and in rule 8 thereof as follows:—'Proposed ordinances shall be known

as Ordinance Bills. They shall be numbered consecutively and filed by the Recorder in the order in which they are introduced. All bills and resolutions shall contain upon the backs thereof the name of the member or committee introducing the same; provided, any member of any committee can introduce any bill or resolution by request, and so designate on the back thereof. If objection be made to the introduction of an ordinance bill, it shall lie over until the next meeting except when the bill is reported by the committee, or unless otherwise directed by the council. And in rule 9 thereof as follows:— Every Ordinance Bill shall receive three readings previous to its being passed. The presiding officer shall give notice at each reading whether it be the first, second or third. If the bill be objected to on its first reading, the presiding officer shall immediately state the question to be 'Shall the bill be rejected?" if no objection be made, or if the question to reject be lost, the bill shall be read the second time at once. By unanimous consent, the bill may be read the second time by title, and in rule 10 thereof, as follows:— 'Upon the second reading of the bill the presiding officer shall state: 'This is the second reading of the bill; it is ready for commitment or amendment.' No bill shall be amended or committed until after it has been twice read; and in rule 11 thereof as follows: 'If a bill be

so amended as to make it necessary, in the opinion of the majority, that it should be engrossed, it may be referred to the Recorder for that purpose, and he shall at the next regular meeting, report a correctly engossed copy of the bill, and in rule 12 thereof as follows:—' No bill shall be read the third time during the same session at which it is introduced, except by unanimous consent of the council, expressed by an affirmative vote on calling the roll, and in rule 13 thereof as follows: 'The final question after the second reading of every bill shall be, 'Shall the bill be read the third time?' No amendment shall be received for discussion after the third reading of any bill, but it shall at all times be in order, before the final passage of any such bill, to move its commitment under special instructions;' and in rule 14 thereof as follows:— 'After the third reading of the bill, the presiding officer shall state the questions to be, 'Shall the bill pass?' The recorder shall call the roll and enter the ayes and noes in the journal;' and in rule 15 thereof as follows:— 'After the passage of a bill, the question shall be stated to be, 'Shall the title of the bill be the title of the ordinance?' A majority of all of the members elected to the council shall be necessary to pass every ordinance bill;' and in rule 16 thereof as follows:— 'The recorder shall number all the ordinances heretofore passed, that remain unnumbered, in the order of their passage, and

hereafter each ordinance shall be known by its appropriate number, every new ordinance receiving the number to which it is entitled;' and in rule 17 thereof as follows:— 'All ordinances shall be signed by the Mayor and Recorder, and shall have thereon the date of passage by the council and date of approval by the Mayor, and in so far as the said resolution No. 1294 of the Common Council of the City of Salem, referred to in paragraph VII of plaintiff's complaint, purports or attempts by its terms to amend section IV of said Ordinance No. 207 referred to in paragraph IV of plaintiff's complaint, the said Resolution is void and of no effect for said Resolution No. 1294 did not receive three previous readings before its adoption by the Common Council of said City of Salem, nor was said resolution submitted to the Mayor or approved by him.

WHEREFORE, defendants having fully answered plaintiff's complaint pray to be hence dismissed with judgment for their costs and disbursements incurred herein.

B. W. MACY
WM. P. LORD,
Attorneys for defendants

"EXHIBIT A"

BEFORE THE RAILROAD COMMISSION OF THE STATE OF OREGON

The City of Salem, a municipal corporation,

Plaintiff,

vs.

Salem Water, Light & Power Co., a corporation,

NO. U. F. 45

COMPLAINT

Defendant.

Comes now the plaintiff above named and for cause of complaint against the defendant, respectfully shows:

1. That the plaintiff is now and at all the times hereinafter mentioned has been, a municipal corporation organized and existing under and by virtue of the laws of the State of Oregon, and located in the County of Marion in said State.

2. That the above named defendant is a corporation organized and existing under and by virtue of the laws of the State of Arizona and is a public utility engaged in the business of supplying water to the inhabitants of the plaintiff municipal corporation and as a part of such business owns, operates and controls a water works and pumping plant and water mains, reservoirs, pumps and other miscellaneous water works, equipment and apparatus all of which is used in supplying water service to and for the public. That as a pub-

lic utility the defendant is subject to the provisions of Chapter 279 of the laws of Oregon for the year 1911.

3. That the territory embraced within the corporate limits of the City of Salem is divided into four general districts commonly known as North Salem, South Salem, East Salem, and Englewood, which are distinguished from the original town site of Salem by the fact that the said districts or parts of the City lie respectively North of Mill Creek, South of Mill Creek, East of the main channel of Mill Creek and Northeast of North Mill Creek and East of 14th Street, the names of said districts being used merely as convenient reference terms. That there has recently been constructed in said City, four general sanitary sewer systems known as the North Salem, South Salem, Marion Street extension and Union Street sewers. That said sewers furnish a reasonably complete system of sanitary drainage for the said general districts of the plaintiff. That in each of said sections or districts of the plaintiff there are many residences which are connected to said sewer system, which are entirely without public water service and are unable to secure the same from defendant for the reason that the distribution mains of the defendant are not extended to any considerable extent through said outlying districts of the plaintiff. That in each of said sections or districts of plaintiff there are many residences and other buildings which are not connected to the said sanitary sewer systems and which are greatly in need of such connection and sewer drainage but a connection with the said sewers would be useless and futile without adequate and efficient water ser-

vice and that they are unable to get such water from the distribution mains of the defendant for the reason that the defendant has failed, neglected and refused to extend its mains to supply such residences and other buildings.

That the public is ready, willing and able to pay for water service and have repeatedly demanded the same in all of the sections of the City above mentioned. That the defendant has failed, neglected and refused to make extensions in said districts in sufficient number and of sufficient extent to supply numerous residences and other buildings which are located therein and which are demanding the said service to such an extent and in sufficient numbers as would return to the defendant a reasonable income upon the investment required to install and operate the same.

4. That in all the said outlying districts or sections of the City there are many residences and buildings entirely without public water service and that many of the residences and other buildings which are furnished and supplied by the defendant receive such service through small distribution mains and that at all times at the outlets of the service pipes of many of the consumers of the defendant, the pressure is very low and insufficient to furnish either satisfactory domestic service or any protection whatever against fire. That the size of the distribution mains of the defendant in nearly all cases in said districts or sections, are so small and of such limited carrying capacity at the pressure maintained by the defendant, that the public is deprived of the fire protection to which it is reasonably

entitled by the installation of fire hydrants upon and along the line of its distribution mains at reasonable intervals.

That by reason of the foregoing facts the plaintiff alleges that the public water service furnished by the defendant to the public is inadequate and insufficient to meet the reasonable demands and needs of the public.

5. That the schedule of charges, rates and tolls in force and effect and on file in the office of the Railroad Commission of the State of Oregon are purely arbitrary with relation to the cost of furnishing such service both as to the schedule of meter rates and flat rates set forth in the said schedule. That the flat rates of the defendant are founded upon purely arbitrary classifications according to the number of fixtures and vessels supplied and the classes of business being served and on areas served with irrigation all of which classifications are made without regard to the quantity of water actually furnished or the cost of making the service and under substantially the same conditions in individual cases meter service is either required from the customer or permitted to the customer which, in comparison with the flat rates in force and effect along with the said meter rates creates a condition of inequality and unjust descrimination.

6. That the rates, tolls and charges of the defendant as shown by the schedule thereof on file and of record in the office of the Railroad Commission of the State of Oregon are producing a revenue to the defendant upon the investment of the defendant, in excess of a reason-

able return upon the amount of money invested in said public water works system and are therefore unjust, unreasonable and unlawful.

WHEREFORE, plaintiff prays your Commission to take such necessary orders for the extension of the distribution mains of the defendant as will relieve the plaintiff of the conditions set forth in this complaint so that the plaintiff may have adequate water service both for domestic as well as fire protection. That the rates of the defendant may be adjusted and equalified so that the same shall be uniform and equal and that said rates may be reduced so that the charges may return to the defendant a reasonable return upon its investment. Plaintiff also prays for an examination and appraisal of the water works system and plant of the defendant and for such other and further relief as may be meet and proper under the provisions of the Oregon Public Utilities Act being Chapter 279 of the laws of the State of Oregon for the year 1911.

CITY OF SALEM, OREGON,
Signed by B. L. STEEVES
Mayor,
ROLLIN PAGE,
City Attorney.

State of Oregon
ss
County of Marion,

I, Rollin K. Page, City Attorney, attorney for plaintiff, do hereby certify that I have carefully compared the foregoing copy of complaint with the original

thereof; that it is a correct transcript therefrom and of the whole thereof.

Dated this 20th day of May, 1913.

ROLLIN K. PAGE,
Attorney for plaintiff.

Endorsed as follows:

Before the Railroad Commission of the State of Oregon.

City of Salem, a municipal corporation, plaintiff, vs. Salem Water, Light & Power Co., a corporation, defendant. Complaint, file No. UF-45.

"EXHIBIT B"

File U-F-45

BEFORE THE RAILROAD COMMISSION OF OREGON

CITY OF SALEM,

Plaintiff,

vs.

SALEM WATER, LIGHT & POWER COMPANY,

Defendant.

ORDER OF COMMISSION

Entered August 19, 1914

Before the Railroad Commission of Oregon

City of Salem,

Plaintiff, ORDER

vs. U-F45

Salem Water, Light & Power Company,

Defendant.

The complaint in the above entitled matter was brought by the City of Salem, a municipal corporation of the State of Oregon, against the Salem Water, Light & Power Company, a public utility corporation. The subject matter of the complaint involves generally the reasonableness of the rates charged by the utility and the adequacy of the pressure afforded within the City of Salem. As the questions at issue necessarily involved a valuation of the property of the utility used and useful in the public service, the complaint asked that an investigation be made by the Commission under the provisions of sections 9 and 10 of Chapter 279 of the General Laws of Oregon for the year 1911, for the purpose of determining the value of the utility's plant, and such investigation was made by the Commission as a part of the hearing on the complaint.

Appearances—

For the plaintiff, Rollin K. Page, City Attorney.

For the defendant, Wm. J. Hagenah.

For the purpose of better advising the Commission, a formal demand was served on the defendant, requiring it to answer in detail as to its capitalization, funded and other indebtedness, and franchises; to supply an inventory of its property, both that used in public service and otherwise; to state the cost thereof, and the estimated cost of reproducing the same, and the depreciation which had accrued thereon; the earnings and expenses from utility service and from other sources; the units of production, and the number of each class of customers served; and the fixed charges, taxes and other charges to be met by the defendant.

This information was embodied in returns submitted, and was examined and checked by the Commission's experts. The Commission was informally advised by the plaintiff City, in advance of the hearing, that it was expected the pertinent facts as to the value of the property of the defendant (except real estate), and all facts as to the reasonableness of defendants rates, to be disclosed by an examination and analysis of defendant's account, would be developed as the result of the labors of the Commission's engineering and accounting force. Such evidence as was introduced on the hearing by the plaintiff as to these points was obtained by examination of the members of the Commission's staff.

Hearings were duly held upon the complaint and answer, after due notice to all parties. The testimony of numerous witnesses was received, and many exhibits were offered and considered. Both plaintiff and defendant waived argument, and the matter was submitted Commission on April 7, 1914. Upon subsequent examination of the record, it became apparent that, due to the intermingling of the utility accounts of the defendant company with the accounts of operations other than those as a public utility, and with other persons and corporations, the returns submitted to the Commission by defendant did not accurately represent the matters therein set forth in certain important particulars. Thereupon, the Commission caused a re-examination of the defendant's accounts to be made upon its own motion. As a result, the parties on July 22, 1914, filed with the Commisssion statements showing corrections

found to be necessary and stipulated they should be considered as in evidence.

From the record before it, the Commission finds:

1. Plaintiff City of Salem is a municipal corporation of the State of Oregon, which has brought the complaint herein by order of its Common Council.

Defendant Salem Water, Light & Power Company is a corporation of the State of Arizona, authorized to transact business within Oregon, owns and operates as a public utility a water system supplying the City of Salem with water for domestic and fire purposes.

2. Defendant's authorized capital stock is $500,000, of which, on December 30, 1913, there had been issued and was then outstanding $416,300 of par value. Of this amount, $300 was paid in cash, and $416,000 was issued for the property of the Salem Water Company, as hereinafter set out. The funded debt of the company on December 31, 1913, consisted of $154,000 in 6% bonds and $80,000 in 5% bonds. The return made by the defendant to the Commission states that all of such funded debt was issued for cash, without commission or discount; the stock and bonds of defendant are not currently on the market, and no quotations thereon are available. From the record it is apparent, as will hereinafter be more fully set out, that of such funded debt, $25,000 in bonds bearing 6% interest was issued for property which at that time was worth not to exceed $5,000, and of which only a small part, at the best, was needed or useful in the economic operation of defendant as a public utility.

3. The defendant is successor by purchase of the

Salem Water Company, an Oregon corporation, which had previously constructed and was operating a system of water works in the City of Salem. The Salem Water Company is still a going concern, and was and is the owner of a considerable amount of other property, real and personal, not devoted to the public use as a water utility. April 21, 1911, a sale was made, which became effective May 1, 1911, whereby the water works property of the Salem Water Company was transfered to the Salem Water, Light & Power Company for an expressed consideration of $541,000. In settlement of such expressed consideration the Salem Water, Light & Power Company assumed the outstanding indebtedness of the Salem Water Company, secured by 6% first mortgage bonds of that company, to the amount of $125,000, and issued to the Salem Water Company $416,000 in the capital stock of the Salem Water, Light & Power Company. At the same time, for the purpose of organizing the Salem Water, Light & Power Company, and qualifying its directors, $300 in capital stock was subscribed for and paid in cash. The first mortgage bonds assumed have since been partially refunded by other now outstanding bonds. Other non-operating property of the Salem Water Company was not transferred to the Salem Water, Light & Power Company, and still remains in the name of the Salem Water Company.

4. By ordinance No. 207 of the City of Salem, approved April 16, 1891, there was granted to the Salem Water Company, its successors and assigns, a franchise to lay water mains in the city streets and alleys for a period of thirty years. In consideration of such fran-

chise the water company was required to furnish the City of Salem water for certain municipal purposes free of charge, and to maintain fire hydrants and cisterns as therein specified, with a pressure of at least 60 pounds at any and all times at each hydrant in the central portion of the city. It was provided by the franchise that the holder should not at any time charge higher rates for water than are customarily allowed for water in towns or cities of like population on the Pacific Coast, nor charge more than $1.82 per month for each hydrant or cistern actually supplied.

By ordinance No 346 of the City of Salem, approved April 16, 1898, the franchise theretofore granted to Salem Water Company was, with the consent of that company, modified to provide that the franchise should continue for the period of 50 years.

5. The franchise (as amended) was transferred with the public utility property of the Salem Water Company to the defendant, which has since operated under the same as a public utility.

6. The records and accounts of the Salem Water Company and of the Salem Water, Light & Power Company prior to December 31, 1913, were intermingled and confused, so that it has been difficult clearly to distinguish between the properties of the two companies, and between properties devoted to the public use and other properties, and private and non-utility ventures of the two companies and their stockholders and officers, and to allocate the revenues derived and expenses thereof.

By the call for information upon the defendant,

hereinbefore referred to, defendant was required to file with the Commission, among other things , a statement showing the original cost of its property, if known. The return made by the company to the Commission was in error in that certain sums were reported as original cost of property devoted to public use which, in fact, were due to property devoted to non-utility operations. These amounts have been eliminated by the Commission.

The cash cost of the physical properties devoted to the public use by the Salem Water, Light & Power Company, on December 31, 1913, was as follows:

To April 30, 1911 (date of transfer from Salem Water Company to Salem, Water, Light & Power Company	$285,674.09
Additions and betterments made from May 1, 1911, to December 31, 1913, by Salem Water, Light & Pawer Company	104,814.29
Total cost of physical property	$390,488.38

Such additions and betterments were added to the plant as follows:

May 1, 1911, to December 31, 1911	$ 35,426.84.
1912	46,686.18.
1913	22,701.27.
Total.	$104,814.29.

The foregoing statement does not show or include the cost of the water rights for power purposes (approximately 150 horsepower) owned by the Company, nor its easement for head works and transmission line upon Minto Bar or Island. The records of neither the defendant nor its predecessor disclose the actual cost of such water power and easements; but by an inventory of the property of the Salem Water Company, Decem-

ber 24, 1891, the earliest record now available before the Commission, they were carried at a value of $35,000. The actual cost of such water power and easements cannot, therefore, be found by the Commission.

The foregoing estimate of original cost includes no allowance for any municipal franchise, or for development of the business, or so-called going concern cost, if any. No depreciation has been charged against the cost of the property in the foregoing figures. After giving consideration to the dates on which the various portions of construction were made, and to the expense of developing the business of the defendant's predecessor into a going concern during the early years of the enterprise, the Commission finds such expense of developing the business as was incurred during the early years of the Salem Water Company was fully amortized and repaid out of the operating income, and that since the transfer to the defendant there has been no deficit or shortage of returns from the operations, due to the development of business or extensions, or otherwise. The business of Salem Water Company, when acquired by Salem Water, Light & Power Company, was fully developed and profitable, and the expense of development of business upon the extensions of the defendant has been fully met as part of its operating expenses.

The consideration for the easement for headworks and transmission line on Minto Bar was the furnishing by the utility to the grantor, his heirs, etc., of certain water for domestic use; and the consideration for the granting of the franchise by the City of Salem was the furnishing of water free for specified municipal purposes.

The cost of furnishing the water called for by such municipal franchise and easement on Minto Bar has been and is now fully taken care of out of the operating expenses, and has been borne ratably by the various patrons of the defendant and its predecessor, as an operating expense.

7. The foregoing estimate of original cost does not include the cost of Lot 8 and the north 7 3-4 feet of Lot 7 in Block 36, in the City of Salem. In the return made by the Company to the Commission the property just described is stated to have cost $25,000. This tract is chiefly valuable for business purposes. Its use for public utility purposes is recent and only partial, and such use as is made of it could readily have been avoided, and now can be dispensed with by a slight rearrangement of the distributing mains of the defendant leading from its pumping station, and by making other arrangements for the storage of a cheap automobile used by the defendant. In the interests of economy in operation, such other arrangements should be made and this valuable property released from utility service. The property in question was not reasonably worth to exceed $5,000 when acquired, and at the present time is worth approximately $7,500. A fair estimate of the then value of the portion used for public utility purposes is $1,000, and such value has not since increased to any considerable extent.

It appears that the tract described was originally acquired by the Salem Water Company August 5, 1908, for $5,000 cash, paid to Edward Hirsch by that company. Title was taken, not in the name of the Com-

pany, but in the name of George Wolover, and no conveyance from him at that time appears in evidence. In January, 1911, the tract was taken out of the property account of the Salem Water Company, but no reimbursement for the advance made by the Company was made by anyone. The "warrants, stocks and bonds" account of the Salem Water Company was charged $5,000, but no detail or explanation of the transaction whatever is furnished by the books of the Salem Water Company. On August 31, 1912, this land was taken into the property account of the Salem Water, Light & Power Company, and its real estate account was charged with $25,000, and George Wolover was credited with a similar amount. The account remained in this condition until June 30, 1913 (after the filing of the complaint herein), when 6% bonds of the Salem Water, Light & Power Company to the amount of $25,000 were delivered to George Wolover to offset his credit. Interest was paid upon such bonds from the date of their issuance to Wolover out of the revenues from public utility operations of the defendant. The return of the Company made to the Commission states that the bonds so issued were issued for cash.

8. To reproduce the property of the defendant used and useful in its service as a public utility, in normal new and usable condition, including the material and supplies on hand, its water rights and easements employed in the public service, and including the portions of Lots 7 and 8 in Block 36 actually used in utility service, all considered as a going concern, on December 31, 1913, would have required the expenditure of approximately

$443,538. Such property has depreciated and falls below the standard of normal new and usable condition (taking into account the salvage value thereof) $70,796, and the reproduction cost new, lessened by such depreciation was, on December 31, 1913, $372,742.

The record shows there is necessary for working capital (aside from the plant) either cash or credit to an amount of $12,000.

9. Defendant's revenue, expenses, income, taxes, and operating profit from its utility operations, since its organization (making adjustments suggested by the stipulation of the parties filed), have been as follows:

	May 1, 1911, to Dec. 31, 1911	1912	1913
Operating Revenue	$43,590.89	$70,142.01	$78,519.79
Operating Expenses	17,614.40	33,489.14	33,783.91
Operating Income	25,976.49	36,652.87	44,735.88
Taxes	100.00	6,772.76	6,807.32
Operating Profits	$25,876.49	$29,880.11	$37,928.56

This statement of operating revenues and expenses, income and profit, does not take into account any increment in land values over the original cost of acquisition of the same, which increment has been considerable in amount.

Defendant has maintained no depreciation fund. It was the practice of the defendant to charge its replacements to operating expenses, and the plant was old enough and so well seasoned, when acquired by defendant, that replacements came with a fair degree of constancy, and hence depreciation has been taken care of out of operating expenses.

The operating profit above has been and is available

for payment of interest on the funded and other debts of the company and for the payment of dividends, and the sum of $35,385.50 was paid as a dividend to stockholders on June 30, 1913.

10. In the company's account has been charged the sum of $3,432.30 as being incurred during the years 1911 and 1912 on account of expenses incident to a proposed sale of the plant of the company to the City of Salem, and $500 during the year 1913 as expenses incident to this investigation. Such expense s are not ordinary expenses of operation. The expenses of this investigation should be properly pro-rated over a series of at least five years, and not charged to the operations of any single year; and the expenses connected with the negotiations for a sale of the defendant's property to the City of Salem should be charged to profit and loss account, and not to operating expenses.

Such extraordinary expenses have not been included by the Commission in its statement of operating expenses, income and profit, above set out.

11. The general expenses of the defendant for the management and superintendence of its properties include salaries paid to the president and vice-president at the rate of $4,800 per annum each. Such expense for management is unnecessarily high and considerably exceeds salaries paid for such services by any other similar utility in this State. The officers mentioned are not employed solely in the conduct of the defendant's public utility business, but to a certain extent their services are rendered in non-utility operations of the Salem Water Company and in other business ven-

tures, without any adjustment being made therefor. A reasonable sum to be expended by defendant for superintendence and management of its public utility operations would not exceed $3,000 per annum. By the practice of economy and reduction of such expense in the general management and operation of the defendant, it will be possible for it to increase its present operating profits at least $6,600 per annum; and the payment of any greater sum by the defendant to its managing officers than what a competent manager could be obtained for is an extra dividend from operating revenue.

12. The annual contribution to a reserve for accrued depreciation upon the public utility plant of the defendant (as such depreciation is defined in the Uniform Classification of Accounts prescribed by the Commission effective July 1, 1913) which should be set aside for such extraordinary replacements as are not taken into account as ordinary repairs, is the sum of $4,700.

13. Upon full consideration of the foregoing, and of all the evidence and proofs offered and received, the Commission determines that the value of the real and personal physical property of the respondent, together with its water rights and easements, stores and supplies on hand, all as actually used and useful in the service of the public, was the sum of $375,000, on the 31st day of December, 1913. Working capital or credit, other than stores and supplies, is additional to the sum so found.

14. The rates charged by the defendant are contained in its Tariff No. 1, filed with the Commission

January 15, 1913, with Supplements Nos. 1, 2, and 3, subsequently filed, which are referred to for greater particularity. Such rates are as follows:

FLAT RATES

(Per Month unless otherwise specified)

Bakeries, no rate less than	$2 00
Bath tubs—Private, first tub	50
Bath tubs—Private, each additional tub	25
Bath tubs—Public, and public buildings and blocks, hotels and boarding houses, barber shops, bath houses, first tub	1 00
Bath tubs—Public, each additional tub	50
Blacksmith shops, first fire	1 00
Blacksmith shops, each additional fire	25
Building purposes—Per 1,000 brick laid, including water for mortar	15
Building purposes—Wetting lime for other purposes than laying brick, per barrel	10
Building purposes—Wetting cement, per barrel	05
Building purposes—Wetting street pavement, per block	5 00
Cisterns, private, per 1,000 gallons	50
Dwellings—Four rooms or less, occupied by one family	75
Dwellings—Five to eight rooms, occupied by one family	1 00
Dwellings—Water closets, first	50
Dwellings—Water closets, each additional	25
Dwellings—Bath tub, first	50
Dwellings—Bath tub, each additional	25
Dwellings, Boilers for heating	2 00
Fishmarkets	1 50 to 2 00
Foundries	6 00 to 8 00
Fire protection—Special or private hydrant, 4-inch connection	4 00
Fire protection—Special or private hydrant, 3-inch connection	3 00
Fire protection—Special or private hydrant, 2-inch connection	2 00
Irrigation—Minimum, $4.00 per season:	
100 to 200 square yards, per square yard	01
Second 200 square yards, per square yard	.5–8c
All over 400 square yards, per equare yard	.1–2c
Washing sidewalks and windows during summer by use of hose, in addition to charge for other uses	50
Premises above 25 feet front subject to a proportional increase in rate.	
Lodges, each (Water closets and urinals extra)	1 00
Offices	50
Photograph galleries	$2 00 to 5.00
Printing Offices and bookbinders	1 50 to 5 00
Public halls and theaters	2 00 to 5 00
Stores—Drugs	2 00
Stores—Grocery	1 00
Stores—Dry goods	1 00

Slop hoppers	5 00
Urinals—Self closing, private	25
Urinals—Self closing public	50
Water closets—Private, first	50
Water closets—Private, each additional	25
Water closets—Public, first	1 00
Water closets—Public, each additional	50
Water closets—One for two families	1 00
Watering carts, per hour	20

10 % discount allowed on all flat rate bills (fire service excepted) paid on or before 10th of current month, and on flat rate irrigation bills paid on or before June 10 of the current year, provided the customer is not delinquent in payment of any such bill.

Public buildings—State, county and government; railroad; automatic water closets and urinals—meter rates.

METER RATES

Quantities used in any one month, without discount; per 1,000 gallons:	
First 15,000 gallons	$0 25
Next 15,000 gallons	20
Next 90,000 gallons	15
Next 130,000 gallons	10
Quantities exceeding 250,000 gallons	05
Minimum charge per month:	
5–8 or 3–4-inch meter	$1 80
1-inch meter	2 25
1 1-2-inch meter	3 00
2-inch meter	3 75
3-inch meter	5 00

The rates of defendant named do not bear equitable and ratable upon the various classes of consumers, and result in the imposition of charges which are unjust and unreasonable and unjustly discriminatory as between various classes of consumers served by the defendant.

It is also apparent that due to lack of inspection by defendant or otherwise, the tariff rates of defendant have not been and are not followed in many cases, but that some customers (other than those permitted by law to receive preferential rates) have been and are charged rates less than those provided in defendant's schedules and others have been charged more than tariff rates.

The rates named in defendant's schedules are higher than the rates for water customarily allowed in towns and cities of like population on the Pacific Coast, and are such that they yield to the owner of such public utility plant an undue return both upon the actual investment of the owners therein and upon the entire fair value of such plant.

15. In order that the charges made by the defendant to the various classes of its customers shall be fair and relatively equitable, and not unjustly discriminatory as between the different classes of its patrons, the various water users should be classified, and the following classification of water users is hereby found to be just and reasonable:

CLASSIFICATION OF WATER USERS

NOTE 1.—Customers in Classes A or B may elect in writing, or the utility may elect, to waive the rates applicable to those classes under Schedule 1, and have installed a meter; and in that event Schedule 2 will govern, instead of the flat rates applicable to Classes A and B in Schedule 1. The utility will not be required to install more meters per month upon such customers' demands than 2% of the total number of unmetered customers who by the terms of these rules are entitled to demand meters in the city served, and shall fill demands in the order of application. The utility shall not be required to bear the expense of installing a meter at a customer's request, under this provision, on a street which has not been brought to established grade.

NOTE 2.—The effect of the naming of an exception to the classification or of a specific rate applicable generally to a particular form of service, is to supersede the classification as to such form of service, whether the exception or specific rate so named exceeds or is less than the rate under the classification.

CLASS A

Apartments occupied by one family.
Art goods stores.
Banks.
Blacksmith shops.
Boat houses.
Carpenter shops.
Churches.
Cigar stands (alone, not with billiard halls or saloons).
Clothing and furnishing stores.
Crockery.
Department stores.
Harness shops.
Jewelry shops.
Lodge halls (not club rooms).
Lumber yards.
Millinery stores.
Offices, private, not otherwise specified, in which water is used only incidentally for convenience of occupants.
Paint shops and stores.
Plumbing shops.
Shoe stores.

Dressmakers' shops.
Dry goods stores.
Dwellings and appurtenant buildings, occupied by one family.
Electric appliance shops.
Fitters' shops.
Flats occupied by one family.
Fuel yards.
Furniture stores.
Gas appliances shops.
Hardware stores.
Stationers' shops.
Stores and shops, not otherwise specified, in which water is used only incidentally for convenience of occupants or customers (including small stands operated as part residence).
Tailor shops.
Tin shops.
Undertaker's parlors.

CLASS B

Bakeries.
Barber shops.
Baths (public).
Billiard halls.
Blue printers.
Boarding houses.
Boiler works.
Bowling alleys.
Butcher shops.
Club rooms.
Confectioner's shops.
Dentist's offices.
Drug stores.
Depots, railways (passenger and freight).
Florists.
Flour and feed mills.
Foundries.
General merchandise.
Grocery stores.
Iron and steel works.
Liquor stores (wholesale without bar).
Livery stables.
Machine shops.
Manufactories, not otherwise specified, in which water is essential in business carried on.
Marble works.
Photograph galleries.
Planing mills.
Printing shops.
Restaurants.
Sheet metal works.
Stores and shops, not otherwise specified, in which water is essential in business carried on, or generally used by customers or the public.
Theaters.

CLASS C

Apartments and flats under single customer's contract.
Breweries.
Brick and tile works.
Building, construction (see exception to classification).
Cider factories.
Colleges.
Construction, buildings, public works, etc.
Creameries.
Dairies.
Docks and warves.
Dye works.
Elevators, hydraulic.
Garages, public.
Greenhouses.
Hospitals.
Hotels.
Ice and cold storage plants.
Laundries.
Office buildings under single customer's contract.
Packing plants.
Pickling works.
Public buildings or works (see exception to classification).
Railroad shops.
Saloons.
Sawmills.
Schools.
Steamboats and steamships (see exceptions to classification).
Tanneries.
Vinegar factories.
Woolen mills.

16. Just and reasonable rates to be charged, imposed and collected by the defendant from the water users supplied by it, and regulations governing such service

are the following, in lieu of the existing rates and charges of the defendant, which existing rates and charges and all rules and regulations of defendant in respect thereto are hereby found to be unjust, unreasonable and unjustly discriminatory in so far as the same differ from the rates, charges and regulations in this finding set out, viz.:

RATES APPLICABLE TO WATER USERS

ACCORDING TO CLASSIFICATION PRESCRIBED

SCHEDULE 1—CLASSES A AND B

Rates per month in advance.

	Class A	Class B
First fixture	$ 70	$1 05
Additional faucets, for bowls, sinks, etc, not otherwise specified.	10	25
NOTE.— Under the foregoing headings are not included drain-cocks, sill cocks, etc., which are used for lawn or garden sprinkiling; hot water faucets in set with cold water faucets at same location when the latter are counted; barn irrigating, garage and other faucets, the principal function of which is to supply the water for services hereinafter in this schedule described, which are paid for by the customer at flat rates. Stationary wash tubs in sets at the same location count as one additional faucet.		
Baths	20	75
Additional baths, each	20	75
Toilet	40	75
Additional toilets, each	25	50
Urinal, single fixture, or per 2ft. length, each	40	75
NOTE.— The foregoing rates are based on the normal use of the service by an everage number of eight users or less. Increase the above rates 10 per cent for each five normal average users above eight in number.		
Automobiles, kept on premises	20	20
Barber's chairs after first, each		25
Dentist's fountain		75
Horses and cows, each	20	20
Sprinkling lawns and gardens, also outside of industrial plant through common small hose with nozzle or lawn fountain, first 3,000 sq. ft. or less (building space included). Payment of four months in advance allows use for 12 months in advance.)	60	60
Do, each additional 1,000 sq. ft. (upon same terms)	15	15
Sillcocks for washing store fronts	25	25

Bubbling or spray fountains, constant flow	1 00	1 00
Bubbling fountain, intermittent flow	50	50

NOTE.— Rates in Schedule 1 are subject to a discount of 10 per cent when paid on or before the tenth of the current month, provided the customer is not at the time delinquent in the payment of such bill.

SCHEDULE 2—CLASS C

Water delivered through meters, of any size, in one month:

	Per 100 cu. ft.
First 200 cu. ft.	$ 40
Next 300 cu. ft.	25
Next 1,500 cu. ft.	15
Next 14,000 cu. ft.	12
Next 20,000 cu. ft.	07 1-2.
All over 36,000 cu. ft.	05

Minimum charges, according to size of consumer's service pipe and meter employed, per month:

Size of service pipe	Corresponding size of meter	Minimum charge
3-4 inch	5-8 inch	$ 1 20
1 inch	3-4 inch	1 75
1 1-4. inch	1 inch	2 60
1 1-2. inch	1 1-2. inch	3 90
2 inch	2 inch	7 00
3 inch	3 inch	12 00
4 inch	4 inch	19 00

If size of meter employed does not correspond with size of pipe as per above table, apply whichever minimum is lowest. Example: With 3-4-inch meter used in connection with 3-4-inch pipe, the minimum on 3-4-inch pipe controls, rather than the minimum on 3-4-inch meter.

EXCEPTIONS TO CLASSIFICATION

Construction of public works, buildings, etc., 1 1-2 times Schedule 2 rates, without monthly minimum.

On small construction jobs, or where setting of meter is impracticable, use estimated quantities.

SPECIFIC RATES

	Per month
Steam or hot water heating furnaces connected with service, in residences and churches	$ 25
Do, other installations, per 1,000 sq. ft. of floor space (minimum 25c per month)	10
Steamboats and steamships: Schedule 2 applies only when supply is through regular service covered by usual contact. Irregular service, double Schedule 2 rates will apply, without minimum.	
Municipal fire hydrants, each	2 50
Fire protection standpipes, inside buildings, and private hydrants—	
2-inch or less connection	2 00
3-inch connection	3 00

4-inch connection..... 4 00

Subject to a discount of 10 per cent on all specific rate bills except fire service when such bills are paid on or before the tenth of the current month, provided the customer is not delinquent in payment of his bill.

17. By resolution of the Common Council of the City of Salem, adopted March 16, 1914, and filed with the Commission March 18, 1914, it was resolved that the Commission, in adjusting the rates of the defendant for private users, should take into consideration the price at which hydrants should be charged to make an equitable rate for the private user, and that if the rate presently charged the City for hydrants by the defendant should be too high or too low, it be adjusted accordingly.

Pursuant to such request and from the record before it, the Commission finds the rate charged by defendant to the City of Salem for fire hydrants and cisterns is insufficient as compared with the charges made to private users, considering the relative demands of the service and the amount of investment on account of the City and private consumers, respectively; and that the present hydrant rate, $1.82, casts an undue burden upon other users than the City. The effect of such unduly low rate is that patrons who use water have been compelled to pay and now pay more than a reasonable rate for their service to make up the deficiency in returns for service to the City from which they derive no benefit that is not equally shared by taxpayers and property owners who are not patrons of defendant. A just and reasonable hydrant rental is the sum of $2.50 per hydrant per month. In adjusting the schedule of rates for private water users above prescribed, the ac-

tion of the Common Council of the City of Salem, and this finding as to a reasonable rate for hydrants, have been taken into consideration by the Commission.

The action of the Common Council of the City of Salem does not in terms contemplate any waiver of the franchise provision as to the furnishing of water for the other purposes required by the franchise, and the rates prescribed by the Commission for private users have been fixed in contemplation of the continuance of the free service afforded the City in return for the franchise granted.

18. The complaint alleges the refusal of the defendant to make extensions into sections of the city which reasonably should be supplied by the defendant under its franchise and general duties as a public utility; and that in certain outlying districts the service afforded and pressure supplied are insufficient to furnish either satisfactory domestic service or any protection whatever against fire. The evidence adduced on behalf of the plaintiff City of Salem does not bear out these allegations of its complaint. Observations and tests made by the Commission, show that the past complaints as to inadequacy of pressure have been largely removed since the filing of the complaint herein, by betterments of the distributing system which have recently been made. The pressure complained of is chiefly during the sprinkling hours of the heated period during the summer, but such pressure now compares favorably with the service afforded generally by other water plants throughout the State, both municipal and privately owned.

19. It is the practice of the defendant to make the

following charges to patrons for connecting with its mains, including the opening of the main by the installation of a corporation cock or tee, namely:

1-2- inch opening	$ 1 00
1– inch opening	2 00
1 1-2- inch opening	5 00
2– inch opening	20 00
4– inch opening	40 00

In addition defendant requires its patrons to lay their own service mains and pipes from the mains of the defendant in the street to the point of application on the consumer's premises, notwithstanding the consumer has no franchise or rights to open or use the streets, and although the general practice of water utilities is to bring the water from the street main to the street property line of the patron.

This practice of the defendant is unreasonable and unjust. A just and reasonable practice is for the defendant to make the connection between its distribution mains and the services of its customers, and to furnish the necessary service main from its distribution main to the street property line of each consumer.

20. By tariff regulation the defendant claims the right at any time to attach meters to the service pipes of patrons at such places, and at such places only, as it may deem best, and to charge for the quantity of water measured, or used, at the meter rates carried by its tariffs, if the same exceed the flat rate application, but in any event to exact as a minimum the flat rate provided by its tariffs. This regulation of the defendant is unjust and unreasonable and unjustly discriminatory against patrons so arbitrarily placed on metered ser-

vices. A just and reasonable regulation and practice for the defendant to follow in the future is, in event it has a meter installed, to charge, impose and collect rates based upon the metered service schedule only, subject to the minimum for metered service, and without reference to flat rates.

21. Defendant in its tariff carries a provision as follows:

> "Water required for purposes which are not specified in the above tariff, the rate shall be fixed by the superintendent, who will, upon personal examination of the premises of any applicant for water, fix upon its rate; his decision being subject to modification by the Board of Directors of the Salem Water, Light & Power Company. The right is reserved by the Directors to amend or add to these rules and regulations, or to change the water rate as experience may show to be necessary or expedient without notice."

So far as the foregoing regulations of defendant provide for the charging, demanding, or collecting of rates other than those contained in the regularly published and filed tariffs of the defendant, or established by order of this Commission; and so far as the defendant attempts to reserve the right to change any of its rates without the notice required by law, the same are unlawful, unreasonable, and unjustly discriminatory.

22. The defendant maintains two suction pipes from its intake on Minto Island to its pumping station on the mainland, which pass for a considerable distance, under slack water of the Willamette River, contaminated with

sewerage. Only one of these suction pipes is employed at the present time, and the other was constructed for use in event of leakage in the used pipe or other emergency. By the genearl rules of the Commission relating to the Standards of Quality and other service conditions of water utilities in the State of Oregon, the Commission's File U-F-61, effective July 1, 1914, entered in a proceeding wherein the defendant was a party, it was ordered:

> "Rule 27. *Purity of Water Supply for Domestic Purposes.* (a) Each water utility delivering water for domestic purposes shall furnish a supply which shall at all times be free from injurious physical elements and disease-producing bacteria, and shall cause to be made such tests and take such precautions as will insure the constant purity of its supply. A record of all tests and reports pertinent to the water supply shall be kept in accordance with Rule 3."

The Commission is of the opinion that a necessary precaution to insure the constant purity of the supply of water furnished by the defendant is that defendant shall test the entegrity of each of its pipes at least quarter annually, by closing the valve at the intake and reversing the pressure under gauge to determine whether any leakage exists, which would result in contaminated water finding its way into the mains when the pipes are under suction. Oral suggestions have been made to the officers of the defendant that this precaution be taken, but the defendant has neglected and declined to make such tests. This question is not formally at

issue in this proceeding, under the complaint filed by the City, hence no formal order as to such test is within the jurisdiction of the Commission in the present case, although the facts as to the conditions of the suction pipes appear of record. However, the Commission renews its recommendation, and now requires the defendant to answer thereto within ten days from the date of the service of a copy of this order upon it, and to show cause, if any it has, why such tests should not be so made by it.

WHEREFORE, IT IS ORDERED, CONSIDERED, AND DETERMINED, that the defendant shall cease and desist from making, imposing and charging the rates and charges now made and imposed by it under the provisions of its Tariff O. R. C. No. 1, together with its Supplements Nos, 1, 2 and 3 thereto, in as far as the same differ from the rates herein found to be just and reasonable, and that the defendant shall classify its water users according to the classification hereinbefore found to be just and resonable and non-discriminatory, and shall hereafter impose and collect the charges in the schedule hereinbefore found to be just, reasonable, and not unjustly discriminatory, without personal discrimination between its patrons other than as expressly permitted by law, and that defendant shall in the future follow and observe the practices hereinbefore found to be reasonable and just in lieu of those found to be unjust and unreasonable. This order shall be in full force and effect October 1, 1914. A copy of this order shall be immediately served upon the plaintiff and the defendant, and prior to the date the same becomes fully effective,

defendant shall publish and file with the Commission new schedules in lieu of its existing schedules, embodying the rates and practices herein prescribed. As hereinbefore provided, defendant is required to make answer as to the testing of its suction pipes, in writing, within ten days from the date of the service of a copy hereof upon it.

Dated at Salem, Oregon, this 19th day of August, 1914.

RAILROAD COMMISSION OF OREGON
by FRANK J. MILLER,
THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

SEAL

Attest:
H. H. COREY,
Secretary.

EXHIBIT "C"

1914	October	148	$269.36
"	November	155	282.10
"	December	157	285.74
1915	January	157	285.74
"	February	157	285.74
"	March	157	285.74
"	April	157	285.74
"	May	157	285.74
"	June	159	289.38
"	July	163	296.66
"	August	166	302.12
"	September	166	302.12

1915	October	167	303.94
"	November	167	303.94
"	December	167	303.94
1916	January	167	303.94
"	February	167	303.94
"	March	167	305.76
"	April	168	305.76
"	May	168	305.76
"	June	168	305.76
"	July	168	305.76
"	August	168	305.76
"	September	176	320.32
"	October	176	320.32
"	November	176	320.32
"	December	176	320.32
1917	January	176	320.32
"	February	176	320.32
"	March	176	320.32
"	April	176	320.32
			$9373.00

STATE OF OREGON
County of Marion, ss.

I, W. E. Keyes, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; that I am familiar with the contents of the within answer, and that the facts therein alleged are true, as I verily believe.

(Sgd) W. E. KEYES,
Mayor of the City of Salem.

Subscribed and sworn to before me this 26th day of January, 1918.

(SEAL) (Sgd) G. E. UNRUH
Notary Public for Oregon.

My commission expires January 24th, 1920.

Due and legal service of the within answer at Portland, Oregon, by certified copy thereof, is hereby admitted on this 13th day of February, 1918.

(Sgd) M. M. MATTHIESSEN,
of Attorneys for Plaintiff.

And afterwards, to-wit, on the 18th day of February, 1918, there was duly filed in said Court, a demurrer to the amended answer in words and figures as follows, to-wit:

DEMURRER TO AMENDED ANSWER.

Comes now the plaintiff and demurs to all the Affirmative matter set out in paragraphs numbered II to IX, both inclusive, of the amended answer herein, and also to all of the further and seperate answers and defenses contained in said amended answer of the defendants herein, upon the ground that said defendants in said affirmative matter set out at large in said paragraph numbereds II to IX, both inclusive, and in said three further seperate answers and defenses, and in each and all of them, fail to state facts sufficient to constitute a defense to the cause of action set out in the complaint herein as amended.

Upon the argument of this demurrer, counsel for the plaintiff will contend as follows:—

1. The first further and seperate answer and defense is insufficient insofar as it sets up an alleged impairment of the obligations of a contract, because the franchise granted to plaintiff's assignor by the City of Salem was granted subject to the possible future exercise of the rate making power and of the police power by the State of Oregon, and that said rate making and police power did remain, and still is vested, in the legislature of the State of Oregon, because there was no delegation by the legislature to the City of Salem of the power to contract away for the time being the right to regulate rates in the future; that the giving of said franchise was not ratified by Chapter 80 of the laws of Oregon for the year 1911, and that said further separate answer and defense is insufficient insofar as it sets up a violation of section 1 of the XIV Amendment to the Federal Constitution, because it fails to specify any violation thereof and further because Chapter 279 of the laws of Oregon for the year 1911 is not in violation of the provisions of the XIV Amendment to the Federal Constitution, or of the Constitution of Oregon.

2. The second further and seperate answer and defense is insufficient, first, because the regulation of rates is not a matter of purely local or municipal concern, and secondly, because if the regulation of rates were a matter of municipal concern the legislature of the state has, and in 1911 did have, power to pass general laws affecting the charters of cities and towns.

3. The third further and separate answer and defense is insufficient because Chapter 279 of the laws

of Oregon for 1911 is not in violation of section 10 of Article I of the Federal Constitution, or section 21 of Article I of the State Constitution, or of the XIV Amendment of the Federal Constitution, or section 2 of Article XI of the State Constitution; consequently, whether or not resolution numbered 1294 of the City of Salem is effective or not may be disregarded. In this connection, however, plaintiff will contend that there is, and was, no provision of law in the charter of the defendant municipality requiring that action of the sort thereby taken must be by way or ordinance

4. The matter set out argumentatively or by recital in paragraphs numbered II to IX, both inclusive, of the amended answer are insufficient, because of the various grounds hereinabove stated as to the first, second and third further and separate answers and defenses, and further because upon the proper construction of the franchise (Ordinance No. 207) it is clear that the stipulation as to the rate for hydrant service was not by way of condition, but at most a regulatory measure; that the Public Service Commission of Oregon, as established by Chapter 279 of the Laws of Oregon for the year 1911 as amended, had power to hear and determine the question of the reasonableness of the rates charged by plaintiff to the defendant for hydrant service and to fix such rate especially with the consent of the defendant municipality, as evidenced by resolution numbered 1294, and by the filing of the complaint before the Public Utility Commission, appended as an exhibit to the amended answer herein; and Chapter 80 of the laws of 1911 was

not a ratification by the legislature of the action taken by the city of Salem in the enactment of Ordinance No. 207 and the ordinances supplemental thereto.

Dated this 16th day of February, 1918.

WOOD, MONTAGUE, HUNT & COOKINGHAM
M. M. MATTHIESSEN

Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurer is well taken in law.

M. M. MATTHIESSEN,
Of Attorneys for Plaintiff

Service of the within demurrer by certified copy, at Salem, Oregon, is hereby admitted this 18th day of February 1918.

WM. P. LORD,
Of Attorneys for Defendants.

Filed February 18, 1918. G. H. Marsh, Clerk.

And aterwards, to-wit, on Monday, the 25th day of February, 1918, the same being the 96th Judicial day of the Regular November Term of said Court; Present, the Honorable Robert S. Bean, United States District Judge presiding; the following proceedings were had in said cause, to-wit:

ORDER SUSTAINING DEMURRER TO AMENDED ANSWER

This cause came on regularly for hearing the 25th day of February, 1918, before the Hon. Robert S. Bean, a Judge of the above entitled court, upon plaintiff's

able, and asking the Commission to make a valuation of the Company's property and to adjust and equalize the rates to be charged by it so that the same shall be equal and uniform and afford the Company a reasonable return upon its investment. Subsequently and while the matter was pending before the Commission, the City Council adopted a resolution declaring that the Commission in adjusting the rates for private uses, shall take into consideration the rates which should be charged for hydrants so as to make an equitable rate for the private user, and if the rate now charged the City is too high or too low that it be adjusted accordingly, and the City Recorder was instructed to send a copy of the resolution to the Commission. The resolution was duly filed with the Commission and thereafter there was a full hearing before the Commission on all matters mentioned and referred to in the petition and resolution, and the Commission among other things found that the rate specified in the company's franchise for hydrants was an undue burden upon the users of water other than the City and compelled them to pay more than a reasonable rate for their service, and thereupon it fixed and decreed the rate to be charged the public and the City, ordering that the City should pay two-dollars and fifty cents ($2.50) per month for hydrant service. The order became effective October 1, 1914. Thereafter the company continued to furnish water for hydrants and the same was accepted by the City, but it has refused to pay for the same in excess of the franchise rate, and hence this action.

The position of the City is that the rate to be charged for fire hydrants as stipulated in the franchise granting the Water Company the right to use the streets of the City constituted a contract between it and the Company which could not be impaired by subsequent State action. A municipal corporation is a political subdivision of a state existing by virtue of the exercise of legislative authority and while it may own property not of a public or governmental nature which is entitled to the constitutional protection, there is authority for holding that a contract between it and a public service corporation based on accepted conditions in a municipal ordinance granting to such corporations a right to use and occupy streets of the City is not private property beyond the control of the state, and that the state has the same right to change or modify such contract with the consent of the grantee that the city would have. (Worcester vs. Worcester Con. St. RR., 196 U. S. 539.) But assuming that the Public Service Commission had no power or authority to change the franchise rates on its own initiative, or upon the petition of some third party, it clearly had a right to do so by the consent of the City and such consent was manifest when it voluntarily invoked the power of the Commission to readjust the rates to be charged by the Water Company to the general public and itself, so as to make such rates equitable and reasonable to all parties. Having done so, it cannot now challenge the order of the Commission as far as it is affected because it is in violation of the contract with the Water Company. The Public Service Commission has jurisdiction over

the rates to be charged by a public utility and power to regulate and fix such rates. Portland R. L. &. P. vs. Portland, 201 Fed. 119; Cal.-Ore. Power vs. Grants Pass, 203 Fed. 173; Portland R. L. & P. vs RR Com. 229 U. S. 397; Portland R. L. & P. vs. RR Com., 56 Ore. 468; Woodburn vs Public Service Com., 82 Ore. 114.) When therefore the City petitioned the Commission to examine into and readjust the rates to be charged by the plaintiff to itself and the general public so as to make such rates fair and reasonable it thereby waived any rights it might have under its contract with the plaintiff and submitted the entire matter of rates to a competent tribunal having jurisdiction of the subject matter. It cannot now set up that the order which was invited by it and the natural result of its own action impaired the contract between it and the company. (Franscioni vs. Soledad L. & W. Co., 149 Pac. 161; New Orleans vs. N. O. Water Works, 142 U. S. 79.)

The demurrer is therefore sustained.

And afterwards, to-wit, on the 26th day of February, 1918, there was duly filed in said Court, Motion for Judgement upon the Pleadings, in words and figures as follows:

MOTION FOR JUDGMENT UPON THE PLEADINGS

Comes now the plaintiff by its attorneys, Messrs. Wood, Montague, Hunt & Cookingham, and moves this court for a judgment upon the pleadings in accordance with the prayer of its amended complaint.

This motion is based upon the pleadings in this cause and the record herein, including the refusal of the defendants to plead further upon the sustaining of the demurrer to their amended answer herein.

WOOD, MONTAGUE, HUNT and COOKINGHAM,
Attorneys for Plaintif.

Service of the within Motion by certified copy, at Portland, Oregon, is hereby admitted this 26th day of February, 1918.

(Sgd) WM. P. LORD,
of Attorneys for Defendants.

And afterwards, to-wit, on Monday the 4th day of March, 1918, the same being the 1st Judicial day of the regular March Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the District of Oregon

JUDGMENT ORDER

SALEM WATER, LIGHT AND POWER COMPANY, a corporation,
Plaintiff,
vs.
THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,
Defendants.

This cause came on regularly for hearing this 4th day of March, 1918, before the Hon. Robert S. Bean, a Judge of the above entitled court, upon plaintiff's motion for a judgment herein upon the pleadings. Plaintiff was represented by its attorneys, Messrs. Wood, Montague, Hunt & Cookingham.

It appearing to the court that all the defendants, acting through their attorneys, B. W. Macy and Wm. P. Lord, did heretofore file an amended answer herein to the affirmative matter of which the plaintiff interposed a demurrer, and that said demurrer having been sustained, the defendants, by their counsel, in open court declined to plead further, and that plaintiff is entitled to a judgment in this cause as prayed for upon the pleadings and issues made by said answer to the amended complaint herein.;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that plaintiff have and recover of and from the defendant, the City of Salem, a municipal corporation organized and existing under and by virtue of the constitution and laws of the State of Oregon, $12,810.88 and the further sum of $602.11, being interest on said principal sum of $12,810.88 at the rate of six per cent. per annum from May 21st, 1917, together with its costs and disbursements herein taxed at $39.55.

Done in open court this 4th day of March, 1918.

R. S. BEAN,
District Judge.

Filed March 4th, 1918. G. H. March, Clerk.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court, and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

PETITION FOR WRIT OF ERROR

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Plaintiff

vs.

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Defendants.

The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, defendants herein say that on the 4th day of February, 1918, this court entered judgment herein in favor of the plaintiff and against the defendants for the sum of $12,810.88, interest $602.11 and costs and disbursements in said action taxed at $39.55 in which judgment and proceedings had prior and subsequent thereto in this cause certain errors were committed to the prejudice of these defendants, all of which will more fully appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE, defendants pray that a writ of error may issue in defendants' behalf to the United

States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of. and that a transcript of the record and proceedings and papers in this cause duly authenticated may be sent to said Circuit Court of Appeals.

B. W. MACY,
WM. P. LORD,
Attorneys for Defendants.

United States of America,
ss
District of Oregon

Service of the within petition for writ of error, and the receipt of a duly certified copy thereof, at the City of Portland in the District of Oregon, is hereby admitted.

WOOD, MONTAGUE AND HUNT,
Attorneys for Plaintiff.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court, and cause, an Assignment of Errors, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

ASSIGNMENT OF ERRORS

SALEM WATER, LIGHT & POWER COMPANY, a corporation,
Plaintiff
vs.
THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,
Defendants

Defendants above named in connection with this petition for writ of error in the above entitled action, suggest that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendants make assignment of errors as follows:

I

The Court erred in sustaining plaintiff's demurrer to defendants' amended answer.

II

The Court erred in sustaining plaintiff's motion for default judgment against the defendants.

III

The Court erred in sustaining plaintiff's motion for judgment on the pleadings and entering judgment thereon.

IV

The Court erred in entering judgment in this cause in favor of the plaintiff and aginst the defendants.

V

The Court erred in allowing any sums of money as interest on the amounts demanded in the complaint and entering judgment therefor.

Each of the foregoing assignments of error are based upon the grounds and for the reason that the same

action is contrary to law and decisions of the courts.

WHEREFORE, the said defendants, defendants in error, pray that the judgment of the District Court of the United States for the District of Oregon in the above entitled cause be reversed, and such directions be given that full force and efficiency may inure to defendants by reason of the facts set out in its answer filed in this cause.

B. W. MACY,
WM. P. LORD,
Attorneys for Defendants.

United States of America,
District of Oregon,—ss

Service of the within Assignment of Errors, and the receipt of a duly certified copy thereof, at the City of Portland in the District of Oregon, is hereby admitted.

WOOD, MONTAGUE AND HUNT
Attorneys for Plaintiff.

And afterwards, on the 22nd day of May 1918, there was filed in said cause an order allowing writ of error and fixing bond in words and figures as follows:

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND

On this 22nd day of May, 1918, the above named defendants, by their attorneys, Wm. P. Lord and B. W. Macy, filed herein and presented to the Court petition praying for the allowance of a writ of error intended to be urged by defendants, and praying also that the transcript of the record and proceedings and papers upon the judgment herein so rendered on the 4th day

of February, 1918, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, presenting therewith assignment of errors, and also praying that an order may be made fixing the amount of an undertaking on writ of errors, and for such other and further proceedings as may appear proper in the premises.

On consideration thereof the Court does hereby allow the writ of error and fixes the amount of said bond in the sum of Three hundred and fifty dollars ($350.00).

This bond is fixed pursuant to a stipulation filed in this cause waiving on the part of the plaintiff a supersedeas bond, and is conditioned that the defendants shall prosecute said writ of error in accordance with said stipulation, and to affect and answer all damages and costs if it fails to make good its plea.

CHAS. E. WOLVERTON,
Judge.

Dated Portland, Oregon, May 22nd, 1918.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court and cause, a bond, in words and figures as follows, to-wit:

BOND

KNOW ALL MEN BY THESE PRESENTS that we, the defendants above named, and particularly the City of Salem, a municipal corporation, duly organized and existing under and by virtue of the Laws of the State of Oregon, by Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, and Wiebca C. Lord, a free-

holder within the County of Multnomah, and State of Oregon, are held and firmly bound unto the above named plaintiff, Salem, Water Light & Power Company, a corporation, in the sum of Three hundred fifty dollars ($350.00), for the payment whereof, well and truly to be made, the said defendants above named and said Wiebca C. Lord, bind themselves, their successors and assigns, jointly and severally by these presents.

Whereas, at a term of the Circuit Court of the United States for the District of Oregon, in an action pending in said Court between the above named plaintiff and defendants, a judgement was rendered against said defendants in favor of said plaintiff, and the said defendants have obtained a writ of error, and filed a copy thereof in the Clerk's office of said Court to enforce the judgemnt in the aforsaid action, and a citation directed to the said plaintiff admonishing it to be and appear before the next session of the United States Court of Appeals for the Ninth Circuit;

NOW THEREFORE the conditions of the above obligations are such that if the defendants above named shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea that the above obligation is void; otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF said City of Salem, a municipal corporation, and the said Walter E. Keyes, and C. O. Rice have caused these presents to be exe-

cuted this 22nd day of May, 1918, by their duly authorized attorney, Wm. P. Lord.

CITY OF SALEM, a municipal corporation
WALTER E. KEYES, and
C. O. RICE.
By WM. P. LORD

WIEBKA C. LORD
Surety

The foregoing bond is approved.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District of Oregon,—ss

I Wiebka C. Lord, being first duly sworn on oath depose and say; that I am surety on the within nndertaking, and that I am not counselor or attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of One thousand dollars ($1000.00) over and above all property exempt from execution.

WIEBKA C. LORD,

Subscribed and sworn to before me this 22nd day of May, 1918.

WM. P. LORD,
Notary Public for the State of Oregon

My Commission expires Dec. 26, 1920.

United States of America,
District of Oregon,—ss.

Due service is hereby admitted of the within bond this 22nd day of May, 1918.

WOOD, MONTAGUE AND HUNT,
Attorneys for Plaintiff.

And afterwards, and on the 17th day of June, 1918, the following proceedings were had in said cause.

ORDER

Based upon a stipulation in this cause, and on good cause shown;

IT IS HEREBY ORDERED that the time of the above named plaintiffs in error within which to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District, be and the same is hereby extended to and including the 6th day of July, 1918.

Dated June 17th, 1918.

CHAS. E. WOLVERTON
Judge.

And afterwards to-wit: on the 3rd day of July, 1918, the following proceedings were had in said cause to wit:

ORDER EXTENDING TIME

It appearing to the Court from the statement of counsel for plaintiffs in error that he is unable to stipulate with opposing counsel that a printed record tendered to the Clerk in this cause for his certificate is a true transcript as is provided by rule of the Court of appeals and that the Clerk of this court is unable to compare said printed record with the original on file in his office by reason of congestion of business before August 1st, 1918, and it satisfactorily appearing to the Court that an order should be made extending the

time of plaintiffs in error to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District, to and including the 1st day of August, 1918.;

IT IS THEREFORE ORDERED AND ADJUGED that the time of the above named plaintiffs in error within which to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District be and the same is hereby extended to and including the 1st day of August, 1918.

Dated July 3rd, 1918.

CHAS. E. WOLVERTON
District Judge.

United States of America
District of Oregon.—ss

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have compared the foregoing printed transcript of record on writ of error in the case in which the Salem Water, Light & Power Company, a corporation, is plaintiff, and defendant in error, and City of Salem, a municipal corporation, Walter E. Keyes, its Mayor and C. O. Rice, its Treasurer, are defendants and plaintiffs in error, with the original in said cause and that the said transcript is a full, true and correct transcript of the record of proceedings had in said Court in said cause as the same appears of record on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said district, this 24th day of July, 1916.

_____

Clerk.